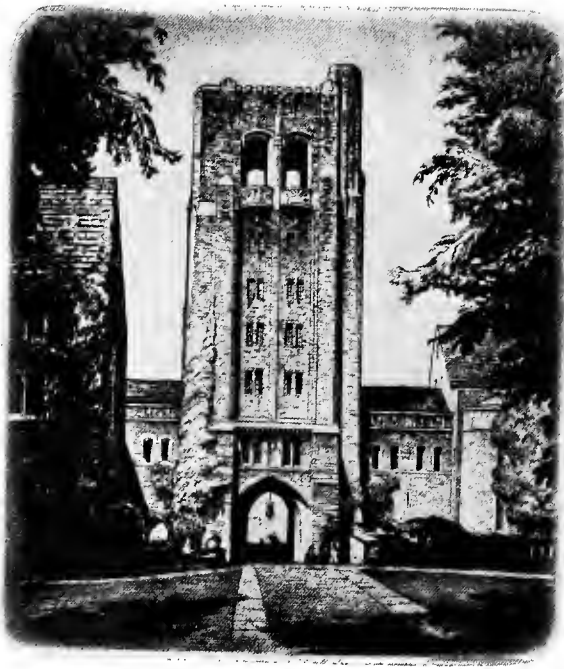






Cornell Law School Library

Cornell University Library
KD 1634.S65 1922

A treatise on the law of master and serv



3 1924 022 479 889

law



Cornell University
Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A TREATISE ON THE LAW OF MASTER AND SERVANT

BY

CHARLES MANLEY SMITH, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,

FORMERLY ONE OF THE MASTERS OF THE SUPREME COURT OF JUDICATURE.

The Seventh Edition

BY

C. M. KNOWLES, LL.B.,

OF THE MIDDLE TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.

LONDON :

SWEET & MAXWELL, LTD., 3 CHANCERY LANE, W.C.2.

TORONTO :

THE CARSWELL CO., LTD., 145 ADELAIDE STREET WEST.

—
1922.

1313950.
PRINTED AT READING, ENGLAND,
BY
THE EASTERN PRESS, LIMITED.

PREFACE

TO THE SEVENTH EDITION.

IN the present edition, Smith's Law of Master and Servant has been reduced to one half its former bulk. This has been accomplished mainly by the omission of the Canadian notes and by substituting, for the appendix of statutes, references to relevant statute law in their appropriate place in the text. On the other hand, a considerable amount of new matter had necessarily to be embodied in an edition which is separated from its predecessor by so long an interval as sixteen years. Upwards of 150 new cases are discussed or noticed; and a reference to the appropriate heading in the index will show the extent to which statute law has modified the legal relationship of master and servant during recent times.

The preparation of the seventh edition has been made the occasion for a thorough revision of the book. All the old matter has been thoroughly scrutinised and verified, and some which has survived in the work since its earliest days, but which is now obsolete, has been removed. Errors which had crept into succeeding editions have been corrected. To many of the cases occurring in the text the *ratio decidendi* has been added, and there has been considerable re-arrangement of matter as between footnotes and text.

But while the book has been much altered for the purpose of the present edition, the general scheme and special characteristics of the work have been carefully preserved.

The index has been amplified and recast.

C. M. KNOWLES.

March, 1922.

PREFACE

TO THE FIRST EDITION

THERE are so few persons not interested in the law applicable to the relationship of Master and Servant, either in one capacity or the other, that the publication of a treatise upon that subject may seem to most people to require but little apology. With *professional* men, however, the case is somewhat different. They have been so long accustomed, when any question of law arising out of the relationship of Master and Servant has been brought before them, to refer, if necessary, to works of *general* application, such as treatises on contracts, agency, or criminal law, or to digests, indices, and abridgments, that *they* may perhaps hardly have felt the want of a separate work upon the Law of Master and Servant. But it is conceived that even professional men may be more truly said to have become *used to the want* of such a work, than not to have felt it. It is, at least, to the existence of a strong impression upon the mind of the author that such was the case, and that a book exclusively devoted to the subject he has attempted to elucidate *was wanted*, combined with a desire on his part to supply what he considered a deficiency in the list of legal publications, that the present work owes its origin. In it he has attempted to concentrate all¹ that information upon the subject treated of which has hitherto been diffused through *many* books. How far he has succeeded in his object it is not for himself to determine. Whilst, however, on the one hand, he is well aware that many defects may, and not improbably will, be discovered in the following work, on the other hand, he ventures to express his hopes that it will not be found altogether useless, even to the members of his own profession, who, he trusts, will receive it with that indulgence which they are ever wont to accord to the efforts of their younger brethren. And

¹ A chapter on the Law of Settlement by Hiring and Service was partially prepared, but the addition of it would necessarily add much both to the size and price of this volume. Upon further reflection, therefore, the author has determined to *omit* it, and this the rather as the subject daily *decreases* in importance, and questions upon it now seldom arise.

if it shall be found by experience that the author has so far succeeded in his undertaking as to have acted the part of a pioneer only upon a path hitherto, if not altogether untrodden, at least but imperfectly explored, he will be sufficiently compensated for his labours by the reflection that his leisure hours, which the present abnormal condition of his profession has rendered more than usually numerous, have not been altogether misspent, whilst devoted to the preparation of this work.

MIDDLE TEMPLE,

Trinity Term, 1852.

CONTENTS.

PREFACE TO THE SEVENTH EDITION	PAGE iii
PREFACE TO THE FIRST EDITION	v
TABLE OF CASES	xi

CHAPTER I.

THE PARTIES TO THE CONTRACT	1—15
Generally	1
Married Women	2
Infants	5
Lunatics	7
Partners	8
Corporations	8
Bankrupts	14

CHAPTER II.

THE CONTRACT OF HIRING AND SERVICE	16—62
1. The Requisites of a Contract of Hiring and Service.	
When Writing necessary—Statute of Frauds	16
Contract of Apprenticeship	22
The Stamp	23
2. The Interpretation of the Contract.	
Admissibility of Parol Evidence	25
The Relationship created by the Contract.	
Partner or Servant	29
Apprentice or Servant	31
Tenant or Servant	32
Agent or Servant	34
Bailee or Servant	34
General Hiring—Yearly Hiring, &c.	34
Termination of General Hiring	37
Notice in Contracts other than Yearly	40
How far Master bound to find Work for Servant	42
Agreements in restraint of Trade contained in Contracts of Hiring and Service	48

CHAPTER III.

	PAGE
THE DUTIES OF THE SERVANT TO THE MASTER, AND THE RIGHTS AND REMEDIES OF THE MASTER AS TO ENFORCING THE PERFORMANCE OF THEM	63—107
1. As between Master and Servant	63
Duties of Servant to Master under Contract of Service	63
Duties of Servant during Service	64
Duties of Servant after leaving Employment	68
Indemnity by Servant for Consequences of his Negligence	69
Duty to Account	70
Remedy for Breach of Contract of Apprenticeship	71
Chastisement of Servant	72
Discharge of Servant	73
Discharge of Apprentice	85
2. As between the Master and Third Persons	85
Of the Action for enticing away a Servant	86
harbouring a Servant	90
the Earnings of a Servant	91
Ownership of Patents	92
Copyright	94
Personal Injuries to a Servant	98
Seduction	100
3. Fidelity Guarantees	105

CHAPTER IV.

THE DUTIES OF THE MASTER TO THE SERVANT, AND THE RIGHTS AND REMEDIES OF THE SERVANT AS TO ENFORCING THE PERFORMANCE OF THEM	108—173
1. As between Servant and Master.	
Of the Master's Duty to receive the Servant into his Service and retain him, and the Servant's Remedies for breach of such Duties	108
Remedies for Servant wrongfully discharged	112
1. The Action for Wrongful Dismissal	112
2. The Common Action for Wages	116
Of the Master's Duty to pay the Servant's Wages, and the Servant's Remedies to recover them	116
Conciliation in Trade Disputes	125
Effect on Contract of Hiring of Master's Bankruptcy	125
Dissolution of Partnership	129
Death	130
Effect on Contract of Service of Servant's Default	132
Death	135
Of the Master's Duty to supply Food and Medicine to the Servant	138
Of the Master's Duty to indemnify the Servant from the Consequences of obeying his Orders	141
The Master's Liability for Personal Injuries to Servant	142
Statutory Provision for the Welfare of Employed Persons	166
2. As between the Servant and Third Persons	168

CHAPTER V.

	PAGE
THE LIABILITY OF A MASTER TO THIRD PERSONS FOR THE ACTS OF HIS SERVANT	174—253
In Cases of Contract	174
Tort—Criminaliter	197
Civilliter	208

CHAPTER VI.

THE LIABILITY OF A SERVANT TO THIRD PERSONS FOR ACTS DONE ON BEHALF OF HIS MASTER	254—281
In Cases of Contract	254
Tort—Criminaliter	266
Civilliter	273

CHAPTER VII.

THE SERVANT'S CHARACTER	282—303
The Character—Defamation	282

CHAPTER VIII.

OFFENCES BY SERVANTS AGAINST THEIR MASTERS	304—341
Burglary by Servant in Master's House	304
Stealing in a Shop, Warehouse, or Counting-house, &c.	305
Stealing in a Dwelling-house to the value of 5 <i>l.</i> with menaces	306
Stealing Goods in process of Manufacture	307
Destroying Goods in process of Manufacture	307
Larceny and Embezzlement by Clerks and Servants	308
The two offences distinguished	308
Larceny	309
Embezzlement	320
Indictment	337
Venue	338
Offences in Special Trades	338
Suing Servant after Conviction	339
Falsification of Accounts	340

CHAPTER IX.

TESTAMENTARY DISPOSITIONS RELATING TO SERVANTS	342—350
--	---------

TABLE OF CASES.

A.

	PAGE
ABBOTT <i>v.</i> Bates, 45 L. J. C. P. 117; 33 L. T. 491; 24 W. R. 101	29
— <i>v.</i> Macfie, 2 H. & C. 744; 33 L. J. Ex. 177; 12 W. R. 315	231
Abbotts <i>v.</i> Barry, 2 Brod. & B. 369; 5 Moore, 98	262
Abraham <i>v.</i> Bullock, 86 L. T. 796; 50 W. R. 626; 18 T. L. R. 701	227, 246
— <i>v.</i> Reynolds, 5 H. & N. 143; 1 L. T. 330; 8 W. R. 181	149
Abrahams <i>v.</i> Deakin, [1891] 1 Q. B. 516; 60 L. J. Q. B. 238; 63 L. T. 690; 39 W. R. 182	224
Abrath <i>v.</i> North Eastern Railway Co., 11 App. Cas. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 32 W. R. 50; 2 T. L. R. 416	214
Acey <i>v.</i> Fernie, 7 M. & W. 151; 10 L. J. Ex. 9; 56 R. R. 671	195
Adam <i>v.</i> Ward, [1917] A. C. 309; 86 L. J. K. B. 849; 117 L. T. 34; 33 T. L. R. 277	286, 287, 300
Adamson <i>v.</i> Jarvis, 4 Bing. 66; 29 R. R. 503	141
Addis <i>v.</i> Gramophone Co., Ltd., [1909] A. C. 488; 78 L. J. K. B. 1122; 101 L. T. 466	115
Admiralty Commissioners <i>v.</i> S.S. Amerika (Owners), [1917] A. C. 38; 86 L. J. (P.) 58; 116 L. T. 34; 33 T. L. R. 135	99, 100
African Association, Ltd., and Allen, <i>In re</i> , [1910] 1 K. B. 396; 79 L. J. K. B. 259; 102 L. T. 129; 26 T. L. R. 234	40
Agar <i>v.</i> Athenæum Life Assurance Society, 3 C. B. (N. S.) 725; 27 L. J. C. P. 95; 6 W. R. 277	180
Aggs <i>v.</i> Nicholson, 1 H. & N. 165; 25 L. J. Ex. 348; 4 W. R. 776	258
Agincourt, The, 1 Hagg. 271; 33 R. R. 717	72
Aishcombe <i>v.</i> Hundred of Spelholme, Holt, 460	178
Albro <i>v.</i> Jaquith, 4 Gray's Rep. (Mass.) 99	164
Aldridge <i>v.</i> Great Western Railway Co., 15 C. B. (N. S.) 582; 33 L. J. C. P. 161	22
— <i>v.</i> Johnson, 7 E. & B. 885; 26 L. J. Q. B. 296; 5 W. R. 703	310
Alexander <i>v.</i> Gibson, 2 Camp. 555; 11 R. R. 797	183
— <i>v.</i> Jenkins, [1892] 1 Q. B. 797; 61 L. J. Q. B. 634; 66 L. T. 391; 40 W. R. 546; 8 T. L. R. 421	285
— <i>v.</i> Mackenzie, 6 C. B. 766; 18 L. J. C. P. 94	192
— <i>v.</i> Sizer, L. R. 4 Ex. 102; 38 L. J. Ex. 59; 20 L. T. 38	258
— <i>v.</i> Southey, 5 B. & Ald. 247; 24 R. R. 348	277, 278
Alfred <i>v.</i> Fitzjames, 3 Esp. 3	117
Allred <i>v.</i> West Metropolitan Tramways Co., [1891] 2 Q. B. 598; 60 L. J. Q. B. 631; 65 L. T. 138; 39 W. R. 609; 7 T. L. R. 609	241
Allen <i>v.</i> Denstone, 8 C. & P. 760	185
— <i>v.</i> Flood, [1898] A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 46 W. R. 258; 62 J. F. 595; 14 T. L. R. 125	87, 88, 89, 169
— <i>v.</i> Hayward, 7 Q. B. 960; 15 L. J. Q. B. 99	238
— <i>v.</i> London and South Western Railway Co., L. R. 6 Q. B. 65; 40 L. J. Q. B. 55; 23 L. T. 612; 19 W. R. 127	224
— <i>v.</i> New Gas Co., 1 Ex. D. 251; 45 L. J. Ex. 668; 34 L. T. 541	154
— <i>v.</i> Rawson, 1 C. B. 551; 68 R. R. 751	93
— <i>v.</i> Taylor, 19 W. R. 556; 24 L. T. 249	56
Allsopp <i>v.</i> Wheatcroft, 15 Eq. 59; 42 L. J. Ch. 12; 27 L. T. 372; 21 W. R. 102	53
Alpertou Rubber Co. <i>v.</i> Manning, 86 L. J. Ch. 377; 116 L. T. 499; 33 T. L. R. 205	69
Alton <i>v.</i> Midland Railway Co., 19 C. B. (N. S.) 213; 34 L. J. C. P. 292; 12 L. T. 703; 13 W. R. 918	99
Amann <i>v.</i> Damm, 29 L. J. C. P. 313; 8 C. B. (N. S.) 597; 2 L. T. 322; 8 W. R. 470	293, 296
Amber Size & Chemical Co., Ltd. <i>v.</i> Menzel, [1913] 2 Ch. 239; 82 L. J. Ch. 573; 109 L. T. 520; 29 L. T. R. 590; 57 S. J. 627	69

	PAGE
<i>Amor v. Fearon</i> , 9 A. & E. 548; 8 L. J. Q. B. 95; 48 R. R. 584	74, 79
<i>Andrew v. Ramsay</i> , [1903] 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450; 52 W. R. 126; 19 T. L. R. 620	66
<i>Andrews v. Askey</i> , 8 C. & P. 7	105
<i>Anglo-American Oil Co., Ltd. v. Manning</i> , [1908] 1 K. B. 536; 77 L. J. K. B. 205; 98 L. T. 570; 6 L. G. R. 299; 72 J. P. 35; 24 T. L. R. 215	204
<i>Anonymous</i> , 1 Show. 95	178
—, 12 Mod. 564	178
<i>Applebee v. Percy</i> , L. R. 9 C. P. 647; 43 L. J. C. P. 365; 30 L. T. 785; 22 W. R. 704	209
<i>Appleby v. Dods</i> , 8 East, 300; 9 R. R. 450	133
— <i>v. Franklin</i> , 17 Q. B. D. 93; 55 L. J. Q. B. 129; 54 L. T. 135; 34 W. R. 231	100, 339
— <i>v. Myers</i> , L. R. 2 C. P. 651; 36 L. J. C. P. 331; 16 L. T. 669	132, 137
<i>Appleton v. Binks</i> , 5 East, 148; 7 R. R. 672	256
<i>Araminta</i> , The, 18 Jur. 793	119
<i>Archard v. Hornor</i> , 3 C. & P. 349	112, 116
<i>Archer v. Marsh</i> , 6 A. & E. 959; 6 L. J. K. B. 244; 45 R. R. 655	20
<i>Argles v. Hcaseman</i> , 1 Atk. 518	111
<i>Armitage v. Insole</i> , 14 Q. B. 728; 19 L. J. Q. B. 202; 14 Jur. 619; 80 R. R. 388	113
<i>Armitage, Ltd. v. Nicholson</i> , 108 L. T. 993; 77 J. P. 239; 11 L. G. R. 547; 29 T. L. R. 425	204
<i>Armory v. Delamirie</i> , 1 Str. 505; 1 Sm. L. C. (12th ed.) 396	210
<i>Armstrong v. Lancashire and Yorkshire Railway Co.</i> , L. R. 10 Ex. 47; 44 L. J. Ex. 89; 33 L. T. 223; 23 W. R. 295	231
— <i>v. South London Tramways Co.</i> , 64 L. T. 96	120
<i>Arnold v. Poole</i> , Mayor of, 4 M. & G. 860; 12 L. J. C. P. 97; 7 Jur. 653; 61 R. R. 664	9
<i>Arton (No. 2)</i> , <i>In re</i> , [1896] 1 Q. B. 509; 65 L. J. M. C. 50; 74 L. T. 249; 44 W. R. 351	340
<i>Ashby v. White</i> , 2 Lord Raym. 938; 1 Salk. 19; 6 Mod. 45; 1 Sm. L. C. (12th ed.) 266	280
<i>Ashley & Smith, Ltd., In re; Ashley v. The Company</i> , [1918] 2 Ch. 378; 34 T. L. R. 585	127
<i>Ashworth v. Stanwix</i> , 3 E. & E. 701; 30 L. J. Q. B. 183; 4 L. T. 85	155
<i>Aspdin v. Austin</i> , 5 Q. B. 671; 13 L. J. Q. B. 155	46, 47
<i>Assop v. Yates</i> , 2 H. & N. 768; 27 L. J. Ex. 156	159
<i>Aste v. Montague</i> , 1 F. & F. 264	197
<i>Astley v. Weldon</i> , 2 B. & P. 346; 5 R. R. 618	63
<i>Athenæum Life Assurance Co., In re</i> , 27 L. J. Ch. 829; 6 W. R. 779	180
<i>Atkin v. Acton</i> , 4 C. & P. 208	77, 133
<i>Atkinson v. Denby</i> , 30 L. J. Ex. 361; 7 H. & N. 934; 7 L. T. 93; 10 W. R. 389	262
— <i>v. Newcastle Waterworks Co.</i> , 2 Ex. D. 441; 46 L. J. Ex. 775; 36 L. T. 761; 25 W. R. 794	162
<i>Atkins v. Kinnier</i> , 4 Ex. 776; 19 L. J. Ex. 132; 80 R. R. 767	53, 58
— <i>v. Pearce</i> , 2 C. B. (N. S.) 763; 26 L. J. C. P. 252	195
<i>Atlee v. Backhouse</i> , 3 M. & W. 633; 7 L. J. Ex. 234	261
<i>Attorney-General v. Carlton Bank</i> , [1899] 2 Q. B. 158; 68 L. J. Q. B. 788; 81 L. T. 115; 47 W. R. 650; 63 J. P. 629; 15 T. L. R. 380	201
— <i>v. Riddle</i> , 2 Cr. & J. 493; 1 L. J. Ex. 182	201
— <i>v. Siddon</i> , 1 Cr. & J. 220; 1 Tyr. 41; 9 L. J. (O. S.) Ex. 7; 35 R. R. 701	201
<i>Attwood v. Munnings</i> , 7 B. & C. 278; 6 L. J. (O. S.) K. B. 9; 31 R. R. 194	175, 192
<i>Austin v. Bethnal Green Guardians</i> , L. R. 9 C. P. 91; 43 L. J. C. P. 100; 29 L. T. 807; 22 W. R. 406	11
<i>Australian Newspaper Co. v. Bennett</i> , [1894] A. C. 284; 63 L. J. P. C. 105; 70 L. T. 597	283
<i>Avery v. Bowden</i> , 6 E. & B. 953; 26 L. J. Q. B. 3; 5 W. R. 45	110
<i>Ayre v. Craven</i> , 2 A. & E. 2; 4 L. J. K. B. 35; 41 R. R. 359	285

B.

<i>BACKHOUSE v. Hall</i> , 6 B. & S. 507; 34 L. J. Q. B. 141; 12 L. T. 375; 13 W. R. 654	106
<i>Baddeley v. Earl Granville</i> , 19 Q. B. D. 423; 56 L. J. Q. B. 501; 57 L. T. 268; 36 W. R. 63	161, 164
<i>Badeley v. Consolidated Bank</i> , 38 Ch. D. 238; 57 L. J. Ch. 468; 59 L. T. 419; 36 W. R. 745	30

	PAGE
Badische Anilin und Soda Fabrik v. Schott, [1892] 3 Ch. 447; 61 L. J. Ch. 698; 67 L. T. 281; 8 T. L. R. 742	53
Bagge v. Whitehead, [1892] 2 Q. B. 355; 61 L. J. Q. B. 778; 66 L. T. 815; 40 W. R. 472; 8 T. L. R. 503	198
Bailey, <i>In re</i> , 3 E. & B. 607; 23 L. J. M. C. 161	19
— v. Sweeting, 9 C. B. (N. S.) 843; 30 L. J. C. P. 150; 9 W. R. 273	18
— v. Thurston & Co., [1903] 1 K. B. 137; 72 L. J. K. B. 36; 88 L. T. 43; 51 W. R. 162; 19 T. L. R. 75	1, 113
Baillie v. Kell, 4 Bing. N. C. 638; 7 L. J. C. P. 249	74, 76
Bainbridge v. Postmaster-General, [1906] 1 K. B. 178; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70	251
Baines v. Geary, 35 Ch. D. 154; 56 L. J. Ch. 935; 56 L. T. 567; 36 W. R. 98 51, 57, 58	
Baker v. Hedgecock, 39 Ch. D. 520; 57 L. J. Ch. 889; 59 L. T. 361; 36 W. R. 840	51, 52
— v. Holme Cultram U.D.C., 85 L. J. K. B. 799; 14 L. G. R. 209; 80 J. P. 241	10
— v. Snell, [1908] 2 K. B. 825; 77 L. J. K. B. 1090; 99 L. T. 753; 24 T. L. R. 811	209
— v. Wicks, [1904] 1 K. B. 743; 73 L. J. K. B. 410; 90 L. J. 706; 52 W. R. 556; 20 T. L. R. 382	209
Baldry v. Bates, 1 T. L. R. 558; reversing <i>ibid.</i> 311 and 52 L. T. 620	183
Baldwin v. Casella, L. R. 7 Ex. 325; 41 L. J. Ex. 167; 26 L. T. 707; 21 W. R. 16	209
Balfour v. Ernest, 5 C. B. (N. S.) 601; 28 L. J. C. P. 170; 7 W. R. 207	192
Ball, <i>Ex parte</i> , 3 D. M. & G. 155	128
—, <i>Ex parte</i> , Shepherd, <i>In re</i> , 10 Ch. D. 667; 48 L. J., Bank. 57; 40 L. T. 141; 27 W. R. 563	100
Bamfield v. Massey, 1 Camp. 460	104
Bamford v. Shuttleworth, 11 A. & E. 926; 52 R. R. 542	261
Bank of England v. Vagliano, [1891] A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657	216
Bank of Ireland v. Trustees of Evans's Charities, 5 H. L. C. 389; 3 Ir. C. L. R. 280	216
Bank of New South Wales v. Owston, 4 App. Cas. 270; 48 L. J. P. C. 25; 40 L. T. 500	214, 224
Bank of New Zealand v. Simpson, [1900] A. C. 182; 69 L. J. P. C. 22; 82 L. T. 102; 48 W. R. 591	28
Bank of United States v. Dunn, 6 Peters, 51	196
Barber v. Dennis, 6 Mod. 69; 1 Salk. 68	92
— v. Gingell, 3 Esp. 60	181
Barker v. Furlong, [1891] 2 Ch. 172; 60 L. J. Ch. 368; 64 L. T. 411; 39 W. R. 621; 7 T. L. R. 406	276
— v. Parker, 1 T. R. 287; 1 R. R. 201	130
Barnes v. Akroyd, L. R. 7 Q. B. 474; 41 L. J. M. C. 110; 26 L. T. 692; 20 W. R. 671	205
— v. Foley, 5 Burr. 2711	280
Barnes & Co. v. Toye, 13 Q. B. D. 410; 53 L. J. Q. B. 567; 51 L. T. 292; 48 J. P. 664; 33 W. R. 15	5
Barnett v. Lambert, 15 M. & W. 489; 15 L. J. Ex. 305	189
— v. South London Tramways Co., 18 Q. B. D. 815; 56 L. J. Q. B. 452; 57 L. T. 436; 35 W. R. 640	195
Barnsley v. Taylor, 37 L. J. Q. B. 39	115
Baron v. Hushand, 4 B. & Ad. 611	71, 265
Barr v. Craven, 89 L. T. 574	55
Barrett v. Deere, Moo. & M. 200; 31 R. R. 730	181
Barrow v. Arnaud, 8 Q. B. 595; 10 Jur. 319; 70 R. R. 568	280
Barry v. Arnaud, 10 A. & E. 646; 9 L. J. Q. B. 226; 50 R. R. 516	280
Bartley v. Richtmyer, 4 Comst. 38	100, 101
Bartonshill Coal Co. v. M'Guire, 3 Macq. 300	151, 152, 158
— v. Reid, 3 Macq. 266	151, 154, 157
Bartram v. Lloyd, 88 L. T. 286; 90 L. T. 357; 20 T. L. R. 281	67
Barwick v. Buba, 2 C. B. (N. S.) 563; 26 L. J. C. P. 280; 5 W. R. 665	110
— v. English Joint Stock Bank, L. R. 2 Ex. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877	171, 183, 215
Bass v. Hendon U.D.C., 28 T. L. R. 317	150

	PAGE
Baster v. London and County Printing Works, [1899] 1 Q. B. 901; 68 L. J. Q. B. 622; 80 L. T. 757; 47 W. R. 639; 63 J. P. 439; 15 T. L. R. 331	77
Bate v. Hill, 1 C. & P. 100; 28 R. R. 766	104
Bateman v. Ashton-under-Lyne (Mayor of), 3 H. & N. 323; 27 L. J. Ex. 458; 6 W. R. 829	14
Bather v. Day, 2 H. & C. 14; 32 L. J. Ex. 171; 8 L. T. 205	210
Batterbury v. Vyse, 2 H. & C. 42; 32 L. J. Ex. 177; 8 L. T. 283; 11 W. R. 891	122
Baumvoll Manufactur Von Carl Scheibler v. Furness, [1893] A. C. 8; 62 L. J. Q. B. 201; 68 L. T. 1; 9 T. L. R. 71	235
Baumvoll Manufactur Von Scheibler v. Gilchrest & Co., [1892] 1 Q. B. 253; 61 L. J. Q. B. 121; 66 L. T. 66; 8 T. L. R. 56	235
Baxter v. Burfield, 2 Str. 1266	130
— v. Earl of Portsmouth, 5 B. & C. 170	8
— v. Gray, 3 M. & G. 771; 11 L. J. C. P. 63; 60 R. R. 607	121
— v. Nurse, 1 C. & K. 10; 6 M. & G. 935; 13 L. J. C. P. 82; 64 R. R. 891	28, 35, 36
Bayley v. Manchester, Sheffield and Lincolnshire Railway Co., L. R. 7 C. P. 415; L. R. 8 C. P. 148; 42 L. J. C. P. 78; 28 L. T. 366	217, 224
— v. Rimmell, 1 M. & W. 506	35
Baylis v. Lawrence, 11 A. & E. 920; 9 L. J. Q. B. 196; 4 Jur. 652; 52 R. R. 537	291
Bazeley v. Forder, L. R. 3 Q. B. 559; 37 L. J. Q. B. 237; 18 L. T. 756	4
Beale v. Thompson, 4 East, 546; 7 R. R. 625	133
Beard v. London General Omnibus Co., [1900] 2 Q. B. 530; 69 L. J. Q. B. 895; 83 L. T. 362; 48 W. R. 658; 16 T. L. R. 499	223
— v. Webb, 2 B. & P. 93	22
Beattie v. Lord Ebury, L. R. 7 H. L. 102; 44 L. J. Ch. 20; 30 L. T. 581; 22 W. R. 897	259
Beaufort, Duke of v. Neeld, 12 Cl. & F. 248	190
Beaulieu v. Finglam, Y. B., 2 H. 4. fo. 18, pl. 6; 1 C. B. 586, n.	210
Beavan v. McDonnell, 9 Ex. 309; 23 L. J. Ex. 94; 22 L. T. 243	8
Becher v. Great Eastern Railway Co., L. R. 5 Q. B. 241; 39 L. J. Q. B. 122; 22 L. T. 299; 18 W. R. 627	99
Beckham v. Drake, 2 H. L. C. 579	8, 16, 101, 114, 123
Bedford v. M'Kowl, 3 Esp. 119	105
Beeching v. Westbrook, 8 M. & W. 411; 10 L. J. Ex. 464; 58 R. R. 755	24
Beeston v. Collyer, 4 Bing. 309; 5 L. J. (O. S.) C. P. 180; 29 R. R. 576	17, 34, 35, 37, 38
Beeton & Co., Ltd., <i>In re</i> , [1913] 2 Ch. 279; 82 L. J. Ch. 464; 108 L. T. 918; 20 Mans. 222	127
Bell v. Drummond, Peake 45	118
Bennett v. Alcott, 2 T. R. 166; 31 R. R. 667, n.	101, 102, 103
— v. Bayes, 29 L. J. Ex. 224; 5 H. & N. 391; 2 L. T. 156; 8 W. R. 320	275
— v. Brumfitt, L. R. 3 C. P. 28; 37 L. J. C. P. 25; 17 L. T. 213; 16 W. R. 131	21
Bennetts v. M'Ilwraith, [1896] 2 Q. B. 464; 65 L. J. Q. B. 632; 75 L. T. 145; 45 W. R. 17; 12 T. L. R. 616	259
Benwell, <i>Ex parte</i> , Hutton, <i>In re</i> , 14 Q. B. D. 301; 54 L. J. Q. B. 53; 51 L. T. 677; 33 W. R. 242	15
— v. Inns, 24 Beav. 307; 26 L. J. Ch. 663	57
Benyon, <i>In re</i> , Benyon v. Grieve, 53 L. J. Ch. 1165; 51 L. T. 116; 32 W. R. 871	347
Bernina, The, 13 App. Cas. 1; 57 L. J. P. D. A. 65; 58 L. T. 423; 36 W. R. 870	231
Berringer v. Great Eastern Railway Co., 4 C. P. D. 163; 48 L. J. C. P. 400; 27 W. R. 681	99
Bertie v. Beaumont, 16 East, 33; 22 R. R. 802	32
Berwick v. Horsfall, 4 C. B. (N. S.) 450; 27 L. J. C. P. 193; 6 W. R. 471	116
Betteley v. Reed, 4 Q. B. 511; 12 L. J. Q. B. 172; 62 R. R. 417	71
Bettini v. Gye, 1 Q. B. D. 183; 45 L. J. Q. B. 209; 34 L. T. 246; 24 W. R. 551	108
Betts v. Armstead, 20 Q. B. D. 771; 57 L. J. M. C. 100; 58 L. T. 811; 36 W. R. 720	204
— v. Burch, 4 H. & N. 506; 28 L. J. Ex. 267; 7 W. R. 546	58
— v. De Vitre, L. R. 3 Ch. 429; 37 L. J. Ch. 325; 18 L. T. 165; 16 W. R. 529	218

	PAGE
Betts v. Gibbins, 2 A. & E. 57; 4 L. J. K. B. 1; 41 R. R. 381	141
Beverley v. Lincoln Gas Co., 6 A. & E. 829; 45 R. R. 626	12
Biddle v. Bond, 6 B. & S. 225; 34 L. J. Q. B. 137; 12 L. T. 178; 13 W. R. 561	260
Biggs v. Evans, [1894] 1 Q. B. 88; 69 L. T. 723; 10 T. L. R. 59	183
Bill v. Bament, 9 M. & W. 36; 11 L. J. Ex. 81; 60 R. R. 658	17
Birch v. Liverpool, Earl of, 9 B. & C. 392; 33 R. R. 212	17
Bird, <i>Ex parte</i> , 33 L. J., Bank. 49	254
— v. Brown, 4 Ex. 786; 19 L. J. Ex. 154; 14 Jur. 132; 80 R. R. 775 ...	176, 177
— v. Lake, 1 H. & M. 111, 338; 8 L. T. 632	56
— v. M'Gaheg, 2 C. & K. 707	121
— v. Randall, 3 Burr. 1345; 1 W. Bl. 387	64, 86, 89, 90
Birkmyr v. Darnell, 1 Sm. L. C. 299	18
Bishop v. Lettis, 1 F. & F. 401	24
Black v. Christchurch Finance Co., [1894] A. C. 48; 63 L. J. P. C. 32; 70 L. T. 77	210, 243
Blackwell v. Pennant, 9 Hare, 551; 22 L. J. Ch. 155	345
— v. Wiswall, 24 Barbour's Rep. 355	214
Blades v. Free, 9 B. & C. 167; 32 R. R. 620	4, 197, 255
Blagg v. Sturt, 10 Q. B. 899; 16 L. J. Q. B. 39; 74 R. R. 534	298
Blaikie v. Stenbridge, 6 C. B. (N. S.) 894; 29 L. J. C. P. 212; 2 L. T. 570; 8 W. R. 239	237
Blake v. Ferris, 1 Seld. Rep. (5 N. Y.) 48	233, 238
— v. Lanyon, 6 T. R. 221; 3 R. R. 162	90
— v. Pilfold, 1 Mood. & Rob. 193; 42 R. R. 776	298
— v. Thirst, 2 H. & C. 20; 32 L. J. Ex. 188; 8 L. T. 251; 11 W. R. 1034	240
— v. Woolf, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813; 79 L. T. 188; 47 W. R. 8	238
Bland v. Ross, 14 Moo. P. C. 210	153
Blaymire v. Haley, 6 M. & W. 55; 9 L. J. Ex. 147; 55 R. R. 501	103
Blessing, The, 3 P. D. 35; 38 L. T. 259; 26 W. R. 404	116
Blower v. Blower, 28 L. J. Ch. 181; 7 W. R. 101	132
Bloxam v. Elsee, 1 C. & P. 558; 30 R. R. 275	93
Boast v. Firth, L. R. 4 C. P. 1; 38 L. J. C. P. 1; 19 L. T. 264; 17 W. R. 29	64, 136
Bodega Co., <i>In re</i> , [1904] 1 Ch. 276; 73 L. J. Ch. 198; 89 L. T. 694; 52 W. R. 249	118
Bolingbroke v. Swindon Local Board, L. R. 9 C. P. 575; 43 L. J. C. P. 287; 30 L. T. 723; 23 W. R. 47	228
Bolton Partners v. Lambert, 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; 37 W. R. 434	177
Bonar v. Macdonald, 3 H. L. C. 226	105
Bond v. Evans, 21 Q. B. D. 249; 57 L. J. M. C. 105; 59 L. T. 411; 36 W. R. 767	203
Booth v. Dean, 1 Myl. & K. 560; 2 L. J. Ch. 162; 36 R. R. 377	345
— v. Helliwell, [1914] 3 K. B. 252; 83 L. J. K. B. 1548; 111 L. T. 542; 78 J. P. 223; 12 L. G. R. 940; 30 T. L. R. 529	12
— v. Mister, 7 C. & P. 66	219
Bosanquet v. Corser, 9 C. & P. 665	177
— v. Forster, 9 C. & P. 659	177
Bosley v. Davies, 1 Q. B. D. 84; 45 L. J. M. C. 27; 33 L. T. 528; 24 W. R. 140	203
Boson v. Sandford, 3 Mod. 321; 2 Salk. 440	252
Boston Deep Sea Fishing Co. v. Ansell, 39 Ch. D. 339; 59 L. T. 345 65, 74, 78, ...	116
Boucher v. Lawson, Ca. temp. Hardwicke, 85	212
Boulton v. Arlsten, 3 Salk. 234; 1 Lord Raym. 225	178
— v. Reynolds, 2 E. & E. 369; 29 L. J. Q. B. 11; 1 L. T. 166; 8 W. R. 62	185, 209
Bournemouth Commissioners v. Watts, 14 Q. B. D. 87; 54 L. J. Q. B. 93; 51 L. T. 823; 33 W. R. 280; 49 J. P. 102	10
Bowen v. Hall, 6 Q. B. D. 333; 50 L. J. Q. B. 305; 44 L. T. 75; 29 W. R. 367	87, 284
— v. Morris, 2 Taunt. 374; 26 R. R. 618	257
Bower v. Peate, 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321	243
Bowes & Partners v. Press, [1894] 1 Q. B. 202; 63 L. J. Q. B. 165; 70 L. T. 116; 42 W. R. 340; 10 T. L. R. 55	64

	PAGE
Boxsius v. Goblet Frères, [1894] 1 Q. B. 842; 63 L. J. Q. B. 401; 70 L. T. 368; 42 W. R. 392; 10 T. L. R. 324	286
Boydell v. Drummond, 11 East, 142; 10 R. R. 450	18
Boyle v. Brandon, 13 M. & W. 738; 14 L. J. Ex. 344	103
— v. Smith, [1906] 1 K. B. 432; 75 L. J. K. B. 282; 94 L. T. 30; 54 W. R. 519; 70 J. P. 115; 22 T. L. R. 200	203
Brace v. Calder, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829; 11 T. L. R. 450	114, 129
Bracegirdle v. Heald, 1 B. & Ald. 722; 19 R. R. 442	17, 108
Bradburn v. Foley, 3 C. P. D. 129; 47 L. J. C. P. 381; 38 L. T. 421; 26 W. R. 423	27
Bradlaugh v. Gossett, 12 Q. B. D. 271; 53 L. J. Q. B. 209; 53 L. T. 620; 32 W. R. 552	279
Bradshaw v. Hayward, Car. & M. 591	20, 35, 117
Brady v. Giles, 1 M. & Rob. 494; 42 R. R. 816	236
— v. Todd, 9 C. B. (N. S.) 592; 30 L. J. C. P. 223; 4 L. T. 212; 9 W. R. 483	183, 191
Branch v. Ewington, 2 Doug. 518	71
Bray v. Chandler, 18 C. B. 718; 4 W. R. 518	81
Breay v. Royal British Nurses Association, [1897] 2 Ch. 272; 66 L. J. Ch. 587; 76 L. T. 735; 46 W. R. 86; 13 T. L. R. 467	141, 274
Brennan v. Gilbert-Smith, 8 T. L. R. 284	40
Brewery Assets Corporation, <i>In re</i> , Truman's Case, [1894] 3 Ch. 272; 63 L. J. Ch. 635; 71 L. T. 328; 43 W. R. 73	179
Briddon v. Great Northern Railway Co., 28 L. J. Ex. 51	213
Bridge v. Grand Junction Railway Co., 3 M. & W. 244; 49 R. R. 590	230, 231
Bridges v. Garrett, L. R. 5 C. P. 451; 39 L. J. C. P. 251; 22 L. T. 448; 18 W. R. 815	259
— v. Potts, 17 C. B. (N. S.) 314; 33 L. J. C. P. 338; 11 L. T. 373	41
Bright v. Lucas, Peake's Add. Cas. 121	92
Britain v. Rossiter, 11 Q. B. D. 123; 48 L. J. Q. B. 362; 40 L. T. 240; 27 W. R. 482	16, 17
Britannic Merthyr Coal Co. v. David, [1910] A. C. 74; 101 L. T. 833; 79 L. J. K. B. 153; 26 T. L. R. 164	164
British Reinforced Concrete Engineering Co. v. Lind, 86 L. J. Ch. 486; 116 L. T. 243; 34 R. P. C. 101, 272; 33 T. L. R. 170	93, 94
Britton v. Great Western Cotton Co., L. R. 7 Ex. 130; 41 L. J. Ex. 99; 27 L. T. 125; 20 W. R. 525	162, 163
Brocklesby v. Temperance Permanent Building Society, [1895] A. C. 173; 64 L. J. Ch. 433; 72 L. T. 477; 43 W. R. 606	189
Bromley v. Smith, [1909] 2 K. B. 235; 78 L. J. K. B. 745; 100 L. T. 731	7, 51
Brook v. Dawson, 20 L. T. 611	130
Brooks v. Hassall, 49 L. T. 569	183
Broughton v. Jackson, 18 Q. B. 378; 21 L. J. Q. B. 265	72
Brown v. Accrington Cotton Spinning Co., 3 H. & C. 511; 34 L. J. Ex. 208; 13 L. T. 94	157
— v. Croft, 6 C. & P. 16, n.	76
— v. Foot, 61 L. J. M. C. 110; 66 L. T. 649	204
— v. Mallet, 5 C. B. 599; 17 L. J. C. P. 227; 12 Jur. 204; 75 R. R. 806	208
— v. Symons, 8 C. B. (N. S.) 208; 29 L. J. C. P. 251; 8 W. R. 460	41
Browning v. Great Central Mining Co., 5 H. & N. 856; 29 L. J. Ex. 399	121
Brunsdon v. Humphrey, 14 Q. B. D. 141; 53 L. J. Q. B. 476; 51 L. T. 529; 32 W. R. 944	90, 210
Bryant v. Flight, 5 M. & W. 114; 8 L. J. Ex. 189	121
Bryant, Powis & Bryant, Ltd. v. La Banque du Peuple, [1893] A. C. 170; 62 L. J. P. C. 68; 68 L. T. 546; 41 W. R. 600; 9 T. L. R. 322	175, 192
Brydon v. Stewart, 2 Macq. 30	157
Buckingham v. Duck, 88 L. J. K. B. 375; 120 L. T. 84; 83 J. P. 20; 17 L. G. R. 19	204
— v. Surrey and Hants Canal Co., 46 L. T. 885	37
Buckley, <i>Ex parte</i> , 14 M. & W. 469; 14 L. J., Bank. 341; 69 R. R. 735	258
Budd v. Lucas, [1891] 1 Q. B. 408; 60 L. J. M. C. 95; 64 L. T. 292; 39 W. R. 350; 7 T. L. R. 242	203
Buller v. Harrison, Cowp. 565	261, 262, 264, 265
Bulling v. Ellice, 9 Jur. 936	343
Bunch v. Great Western Railway Co., 17 Q. B. D. 215; 13 App. Cas. 31; 57 L. J. Q. B. 361; 58 L. T. 128; 36 W. R. 785	190

Bunning v. Lyric Theatre, 71 L. T. 396; 10 T. L. R. 583	PAGE 44
Burchell v. Hickisson, 50 L. J. Q. B. 101	172
Burdett, <i>In re</i> , 20 Q. B. D. 310; 57 L. J. Q. B. 263; 58 L. T. 708; 36 W. R. 345	21
Burdick v. Garrick, L. R. 5 Ch. 233; 39 L. J. Ch. 369; 18 W. R. 387	70
Burges v. Wickham, 3 B. & S. 669; 33 L. J. Q. B. 17; 8 L. T. 47; 11 W. R. 992	29
Burgess v. Gray, 1 C. B. 578; 14 L. J. C. P. 184; 68 R. R. 769	235, 240
Burnley Equitable Co-operative Society v. Casson, [1891] 1 Q. B. 75; 60 L. J. M. C. 59; 63 L. T. 652; 39 W. R. 124; 7 T. L. R. 41	14
Buron v. Dennman, 2 Ex. 167; 76 R. R. 554	177, 252, 273, 279
Burrell v. Jones, 3 B. & Ald. 47; 22 R. R. 296	254, 257
Burton v. Great Northern Railway Co., 9 Ex. 507; 23 L. J. Ex. 184; 2 W. R. 257	46
— v. Le Gros, 34 L. J. Q. B. 91	209
Bush v. Steinman, 1 B. & P. 404	235
Butler v. Basing, 2 C. & P. 613	212
— v. Hunter, 7 H. & N. 826; 31 L. J. Ex. 214; 10 W. R. 214	243
— v. Wigge, 1 Wms. Saund. 65	21
— (or Black) v. Fife Coal Co., Ltd., [1912] A. C. 149; 81 L. J. P. C. 97; 106 L. T. 161; 28 T. L. R. 150	164
Butt v. Great Western Railway Co., 11 C. B. 140; 20 L. J. C. P. 241	212
Butterfield v. Forrester, 11 East, 60; 10 R. R. 433	230, 231
Button v. Thompson, L. R. 4 C. P. 330; 38 L. J. C. P. 225; 20 L. T. 568; 17 W. R. 1069	134
Buxton v. Rust, L. R. 7 Ex. 279; 41 L. J. Ex. 175; 27 L. T. 210; 20 W. R. 1014	18
Byrne, <i>Ex parte</i> , Leighton, <i>In re</i> , 35 L. J., Bank. 43	259
— v. Londonderry Tramway Co., [1902] 2 I. R. 457	228
— v. Statist Co., [1914] 1 K. B. 622; 83 L. J. K. B. 625; 110 L. T. 510; 30 T. L. R. 254	97

C.

CABILL v. Dawson, 3 C. B. (N. S.) 106; 26 L. J. C. P. 253	189
Cairney v. Back, [1906] 2 K. B. 746; 75 L. J. K. B. 1014; 96 L. T. 111; 14 Mans. 58; 22 T. L. R. 776	127
Cairns v. Clyde Navigation Trustees, 25 Rettie, 1021	234
Caledonian Railway Co. v. Mulholland, [1898] A. C. 216; 67 L. J. P. C. 1; 77 L. T. 570; 14 T. L. R. 41	173
Callo v. Brouncker, 4 C. & P. 518	74, 77
Calve's Case, 8 Rep. 32; 1 Sm. L. C. (12th ed.), 131	244
Cameron v. Nystrom, [1893] A. C. 308; 62 L. J. P. C. 85; 68 L. T. 772	149, 238
— v. Reynolds, Cowp. 403	280
Campbell v. Campbell, 7 Cl. & F. 166	69
Capes v. Hutton, 2 Russ. 357; 26 R. R. 102	22
Capron v. Balmond, Roscoe's Nisi Prius Evidence	104
Carden v. General Cemetery Co., 5 Bing. N. C. 253; 8 L. J. C. P. 163; 50 R. R. 682	11
Carnes v. Nesbitt, 7 H. & N. 158, 778; 30 L. J. Ex. 348; 31 L. J. Ex. 273; 4 L. T. 558; 9 W. R. 811	60
Carpenter v. Wall, 11 A. & E. 803; 9 L. J. Q. B. 217; 52 R. R. 513	105
Carr v. Clarke, 2 Chit. 260; 23 R. R. 748	102
Carrol v. Bird, 3 Esp. 201; 6 R. R. 824	282
Carsan v. Watts, 3 Doug. 350	92
Carter v. Hall, 2 Stark. 361	118
Cartmell's Case, L. R. 9 Ch. 691; 43 L. J. Ch. 588; 31 L. T. 52; 22 W. R. 697	195
Cartwright v. Hatcly, 1 Ves. 292	71
Cary v. Cary, 2 Sch. & Lef. 173	348
— v. Matthews, 1 Salk. 191	11
— v. Webster, 1 Str. 480	261, 264
Caswell v. Worth, 5 E. & B. 849; 25 L. J. Q. B. 121; 4 W. R. 231	162, 163
Caton v. Caton, L. R. 2 H. L. 127; 36 L. J. Ch. 886; 16 W. R. 1	22
Catt v. Tourle, L. R. 4 Ch. 654; 38 L. J. Ch. 665; 21 L. T. 188	61

	PAGE
Catterall v. Kenyon, 3 Q. B. 310; 11 L. J. Q. B. 260; 6 Jur. 507; 61 R. R. 235	278
Cave v. Hastings, 7 Q. B. D. 125; 50 L. J. Q. B. 575; 45 L. T. 348	18
— v. Mackenzie, 46 L. J. Ch. 564; 37 L. T. 218	22
Cavenagh v. Such, 1 Price, 328; 16 R. R. 733	274
Cawthorne v. Cordrey, 13 C. B. (N. S.) 406; 32 L. J. C. P. 152	16, 17
Center v. Finney, 17 Barbour's Rep. 95	230
Chamberlain v. Bennett, 8 T. L. R. 234	40
— v. Hazlewood, 5 M. & W. 515; 9 L. J. Ex. 87	100
Chamberline v. Harvey, 5 Mod. 182; 1 Lord Raym. 146	86
Chambers v. Bernasconi, 1 C. M. & R. 347; 3 L. J. Ex. 373; 40 R. R. 604	187
— v. Irwin, Selw. N. P. (13th ed.), 1066	105
Chancey's Case, 1 P. Wms. 408	347
Chaplin v. North Western Railway Co., 5 L. T. 601	110
Chappell v. Bray, 6 H. & N. 145; 30 L. J. Ex. 24; 3 L. T. 278; 8 W. R. 17	196
— v. Poles, 2 M. & W. 867; 46 R. R. 779	263
Chapple v. Cooper, 13 M. & W. 252; 13 L. J. Ex. 286; 57 R. R. 586	5
Charles v. Blackwell, 2 C. P. D. 151; 46 L. J. C. P. 368; 36 L. T. 195;	
25 W. R. 472	180
— v. Taylor, 3 C. P. D. 492; 38 L. T. 773; 27 W. R. 32	151, 153
Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co.,	
10 Q. B. D. 521; 52 L. J. Q. B. 220; 48 L. T. 546; 31 W. R. 445	213
Chater v. Beckett, 7 T. R. 201; 4 R. R. 418	21
Chatfield v. Cox, 18 Q. B. 321; 21 L. J. Q. B. 279	25
Chatterton v. Secretary of State for India in Council, [1895] 2 Q. B. 189;	
64 L. J. Q. B. 676; 72 L. T. 858; 11 T. L. R. 462	298
Cheesman v. Exall, 6 Ex. 341	71, 260
Cherry v. Heming, 4 Ex. 631; 19 L. J. Ex. 64; 80 R. R. 733	17
Cheshire v. Bailey, [1905] 1 K. B. 237; 74 L. J. K. B. 176; 92 L. T. 142;	
53 W. R. 322; 21 T. L. R. 130	227, 246
Chesman v. Nainby, 2 Lord Raym. 1456; 2 Str. 739	53
Chicago and Eastern Railroad Co. v. Flaxman, 42 Amer. Rep. 33	221
Chilcot v. Bromley, 12 Ves. 114	235, 343
Child v. Affleck, 9 B. & C. 403; 33 R. R. 216	289, 302
Childers v. Wooler, 2 E. & E. 287; 29 L. J. Q. B. 129; 2 L. T. 49; 8 W. R. 321	141
Chinnock v. Sainsbury, 30 L. J. Ch. 409; 3 L. T. 258; 9 W. R. 7	110
Chisholm v. Doulton, 22 Q. B. D. 736; 58 L. J. M. C. 133; 60 L. T. 966	
37 W. R. 749	202, 204
Chowne v. Baylis, 31 L. J. Ch. 757; 31 Beav. 351	339
Church v. Imperial Gas Light Co., 6 A. & E. 846; 7 L. J. Q. B. 118; 45 R. R.	
638	11, 12
Churchward v. Chambers, 2 F. & F. 229	76
— v. Reg., L. R. 1 Q. B. 173; 14 L. T. 57	46
Citizens Life Assurance Co. v. Brown, [1904] A. C. 423; 73 L. J. P. C. 102;	
90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497	214
Clark v. Bury St. Edmunds (Overseers), 1 C. B. (N. S.) 23; 26 L. J. C. P. 12;	
5 W. R. 21	32
— v. Chambers, 3 Q. B. D. 327; 47 L. J. Q. B. 427; 38 L. T. 454; 26 W. R.	
613	227, 232
— v. London General Omnibus Co., Ltd., [1906] 2 K. B. 648; 75 L. J.	
K. B. 907; 95 L. T. 435	99
— v. Molyneux, 3 Q. B. D. 237; 47 L. J. Q. B. 230; 37 L. T. 694;	
26 W. R. 104	286, 299
— v. Shee, Cowp. 197	262
— v. Watkins, 9 Jur. (N. S.) 142; 8 L. T. 8; 11 W. R. 319	56
Clarke v. Allatt, 4 C. B. 335	108
— v. Cuckfield Union, 21 L. J. Q. B. 349	13
— v. Earnshaw, 1 Gow, 30; 21 R. R. 790	245
— v. Holmes, 7 H. & N. 937; 31 L. J. Ex. 356; 8 Jur. (N. S.) 992;	
10 W. R. 405	162
— v. Watson, 18 C. B. (N. S.) 278; 34 L. J. C. P. 148; 11 L. T. 679;	
13 W. R. 345	122
Claygate v. Bachelor, Owen, 143; Cro. Eliz. 872	48
Clements v. London and North Western Railway Co., [1894] 2 Q. B. 482; 63	
L. J. Q. B. 837; 70 L. T. 896; 42 W. R. 663	6
Clifford v. Laton, M. & M. 101; 3 C. & P. 15	4
Clouston & Co., Ltd. v. Corry, [1906] A. C. 122; 75 L. J. P. C. 20; 54 W. R.	
382; 93 L. T. 706; 22 T. L. R. 107	76, 77

	PAGE
Clutterbuck <i>v.</i> Coffin, 3 M. & G. 842; 11 L. J. C. P. 65; 6 Jur. 131; 60 R. R. 628	118
Cobb <i>v.</i> Becke, 6 Q. B. 930; 14 L. J. Q. B. 108; 9 Jur. 439; 66 R. R. 606	71
— <i>v.</i> Great Western Railway Co., [1893] 1 Q. B. 459; 62 L. J. Q. B. 335; 68 L. T. 483; 41 W. R. 275; 10 T. L. R. 508	227
Cockayne <i>v.</i> Hodgkisson, 5 C. & P. 543; 38 R. R. 845	291
Coe <i>v.</i> Platt, 6 Ex. 752; 7 Ex. 460, 923; 21 L. J. Ex. 146; 16 Jur. 174	162
— <i>v.</i> Wise, L. R. 1 Q. B. 711; 37 L. J. Q. B. 262; 14 L. T. 891	253
Colburn <i>v.</i> Patmore, 1 C. M. & R. 73; 3 L. J. Ex. 317; 4 Tyrw. 677; 40 R. R. 493	69
Coldrick <i>v.</i> Partridge, Jones & Co., Ltd., [1910] A. C. 77; 79 L. J. K. B. 173; 101 L. T. 835; 26 T. L. R. 164	149, 153
Cole, <i>In re</i> ; Cole <i>v.</i> Cole, [1919] 1 Ch. 218; 88 L. J. Ch. 82; 120 L. T. 374; 35 T. L. R. 183	346
— <i>v.</i> De Trafford and Wife, [1917] 1 K. B. 911; 86 L. J. K. B. 764; 117 L. T. 224; 33 T. L. R. 249; 61 S. J. 354	5
Coleman <i>v.</i> Riches, 16 C. B. 105; 24 L. J. C. P. 125; 3 W. R. 453	183, 229
Coles <i>v.</i> Wright, 4 Taunt. 198	261
Colgate <i>v.</i> Bachelier, Cro. Eliz. 872; Owen, 143	48
Collen <i>v.</i> Wright, 8 E. & B. 647; 27 L. J. Q. B. 215; 5 W. R. 265	254, 259
Collett <i>v.</i> London and North Western Railway Co., 16 Q. B. 984; 20 L. J. Q. B. 411	274
Collinet, <i>Ex parte</i> , 1 Bank & Ins. Rep. 82	127
Collins <i>v.</i> Blantern, 2 Wils. 341; 1 Sm. L. C. (12th ed.), 412	20, 339
— <i>v.</i> Brook, 5 H. & N. 700; 29 L. J. Ex. 255; 2 L. T. 774; 8 W. R. 474	259
— <i>v.</i> Evans, 5 Q. B. 820; 13 L. J. Q. B. 180; 64 R. R. 656	141, 142
Collison <i>v.</i> Warren, [1901] 1 Ch. 812; 70 L. J. Ch. 382; 84 L. T. 482	33, 74
Collman <i>v.</i> Mills, [1897] 1 Q. B. 396; 66 L. J. Q. B. 170; 75 L. T. 590; 13 T. L. R. 122	203
Collyer, <i>Ex parte</i> , 2 Mont. & A. 29	127
Colvin <i>v.</i> Holbrook, 2 Comst. Rep. 126	260
Colyer <i>v.</i> Mayne, 2 C. & K. 1011	104
Commissioners of Police <i>v.</i> Cartman, [1896] 1 Q. B. 655; 65 L. J. M. C. 113; 74 L. T. 726; 44 W. R. 637	202
Connors <i>v.</i> Justice, 13 Ir. C. L. R. 451	77, 285
Continental Caoutchouc and Gutta Percha Co. <i>v.</i> Kleinwort Sons & Co., 90 L. T. 474; 52 W. R. 489	262
Conway <i>v.</i> Belfast and Northern Counties Railway Co., Ir. R., 11 C. L. 345 ..	153
— <i>v.</i> Wade, [1909] A. C. 506; 78 L. J. K. B. 1025; 101 L. J. 248; 25 T. L. R. 779	172
Cooke <i>v.</i> Colcraft, 2 W. Bl. 856; 3 Wils. 380	57
— <i>v.</i> Wilson, 1 C. B. (N. S.) 153; 26 L. J. C. P. 15; 5 W. R. 24	257
Coombs <i>v.</i> Bristol and Exeter Railway Co., 3 H. & N. 1; 27 L. J. Ex. 269; 6 W. R. 335	187
Cooper, <i>Ex parte</i> ; Morris, <i>In re</i> , 26 Ch. Div. 693; 51 L. T. 374	127
— <i>v.</i> Phillips, 4 C. & P. 581	140
— <i>v.</i> Shepherd, 3 C. B. 266; 4 D. & L. 218; 15 L. J. C. P. 237; 77 R. R. 349	89
— <i>v.</i> Simmons, 7 H. & N. 707; 31 L. J. M. C. 138; 5 L. T. 712; 10 W. R. 270	5, 130
— <i>v.</i> Slade, 6 H. L. C. 746; 27 L. J. Q. B. 496; 4 W. R. 461	198, 200
— <i>v.</i> Whitehouse, 6 C. & P. 545	117
Cope <i>v.</i> Rowlands, 2 M. & W. 149; 6 L. J. Ex. 63; 46 R. R. 532	20
— <i>v.</i> Thames Haven Dock Co., 3 Ex. 841; 18 L. J. Ex. 345; 77 R. R. 859 ...	10
Coppen <i>v.</i> Moore, [1898] 2 Q. B. 306; 67 L. J. Q. B. 689; 78 L. T. 520; 46 W. R. 620; 62 J. P. 453; 14 T. L. R. 414	202, 203
Corking <i>v.</i> Jarrard, 1 Camp. 37	262
Cormack <i>v.</i> Digby, Ir. R. 9 C. L. 557	220
Corn <i>v.</i> Matthews, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; 68 L. T. 480; 41 W. R. 262; 9 T. L. R. 183	6
Cornfoot <i>v.</i> Fowke, 6 M. & W. 358; 9 L. J. Ex. 297; 55 R. R. 655	182
Cornford <i>v.</i> Carlton Bank, [1899] 1 Q. B. 392; [1900] 1 Q. B. 22; 68 L. J. Q. B. 196; 68 L. J. Q. B. 1020; 80 L. T. 121; 81 L. T. 415; 16 T. L. R. 12	214
Cornforth <i>v.</i> Danube and Black Sea Railway Co., 2 F. & F. 197	24
Cornwall <i>v.</i> Hawkins, 41 L. J. Ch. 435; 26 L. T. 607; 20 W. R. 653	60
Cotes <i>v.</i> Sadler, 2 Keb. 16	63

	PAGE
Cotton v. Wood, 8 C. B. (N. S.) 568; 29 L. J. C. P. 333	213
Couch v. Steel, 3 E. & B. 402; 23 L. J. Q. B. 121	148
Couchman v. Sillar, 22 L. T. 480; 18 W. R. 757	130
Coupé Co. v. Maddick, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676; 65 L. T. 489	246
Cowan v. Milbourn, L. R. 2 Ex. 230; 36 L. J. Ex. 124; 16 L. T. 290; 15 W. R. 750	74
Coward v. Wellington, 7 C. & P. 531	296
Cowles v. Potts, 34 L. J. Q. B. 247; 13 W. R. 858	290, 294,
Cox v. Feeney, 4 F. & F. 13	295
— v. Mathews, 2 F. & F. 397	85
— v. Midland Counties Railway Co., 3 Ex. 268; 18 L. J. Ex. 65; 13 Jur. 65; 77 R. R. 623	182, 187
— v. Prentice, 3 M. & S. 344; 16 R. R. 238	265
Coxhead v. Richards, 2 C. B. 569; 15 L. J. C. P. 278; 69 R. R. 530	286, 292
Crace, <i>In re</i> ; Balfour v. Crace, [1902] 1 Ch. 733; 71 L. J. Ch. 358; 86 L. T. 144; 18 T. L. R. 321	107
Cranch v. White, 1 Bing. N. C. 414; 4 L. J. C. P. 113; 41 R. R. 616	276
Crane v. Powell, L. R. 4 C. P. 123; 38 L. J. M. C. 43; 20 L. T. 703; 17 W. R. 161	18
Crawfoot, <i>Ex parte</i> , Mont. 270	127
Crawshay v. Thornton, 2 Myl. & Cr. 1	71
Green v. Wright, 1 C. P. D. 591; 35 L. T. 339	34
Crihb v. Kynoch, Ltd., [1907] 2 K. B. 548; 76 L. J. K. B. 948; 97 L. T. 181; 23 T. L. R. 550	154, 155,
Crisp v. Thomas, 63 L. T. 756	253
Critchley, <i>Ex parte</i> , 3 D. & L. 527; 15 L. J. Q. B. 124; 71 R. R. 855	339
Crocker v. Banks, 4 T. L. R. 324	232
— v. Molyneux, 3 C. & P. 470	125
Croft v. Alison, 4 B. & Ald. 590; 23 R. R. 407	218
Crofts v. Waterhouse, 3 Bing. 319; 28 R. R. 631	213
Crosby v. Leng, 12 East, 409; 11 R. R. 437	339
Crosskey v. Mills, 1 C. M. & R. 298; 3 L. J. Ex. 297	71
Cuckson v. Stones, 1 E. & E. 248; 28 L. J. Q. B. 25; 7 W. R. 134	83
Cullen v. Morris, 2 Stark. 577; 20 R. R. 472	280
— v. Thomson's Trustees and Kerr, 4 Macq. H. L. 424; 9 Jur. (N. S.) 85; 6 L. T. 870	279
Cullimore v. Savage South Africa Co., [1903] 2 I. R. 589	225
Cuming v. Hill, 3 B. & Ald. 59; 22 R. R. 305	72
Cunningham & Co., <i>In re</i> ; Simpson's Claim, 36 Ch. D. 532; 57 L. J. Ch. 169; 58 L. T. 16	195
Cunningham v. Fonblanque, 6 C. & P. 44	36, 76
Curtis v. Williamson, L. R. 10 Q. B. 57; 44 L. J. Q. B. 27; 31 L. T. 678; 23 W. R. 236	196
Cussons v. Skinner, 11 M. & W. 161; 12 L. J. Ex. 347	74, 79
Cutter v. Powell, 6 T. R. 320; 2 Sm. L. C. 1; 3 R. R. 185 ... 112, 116, 131, 132, 137	
Czech v. General Steam Navigation Co., L. R. 3 C. P. 14; 37 L. J. C. P. 3; 17 L. T. 246; 16 W. R. 130	213

D.

DAIN v. Wycoff, 3 Seld. Rep. 191	100
Dakin v. Watson, 2 Cr. & Dix. (Irish) 225	24
Dalton v. Angus, 6 App. Cas. 740; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 196	237, 241,
Dalyell v. Tyrer, E. B. & E. 899; 28 L. J. Q. B. 52	236, 274
Dansey v. Richardson, 3 E. & B. 144; 23 L. J. Q. B. 217	245
Darlow v. Edwards, 1 H. & C. 547; 32 L. J. Ex. 51; 6 L. T. 905; 10 W. R. 700	347
Dartmouth, Mayor, &c. v. Silly, 7 E. & B. 97; 26 L. J. Q. B. 90; 5 W. R. 255	106
Daugars v. Rivaz, 29 L. J. Ch. 685; 8 W. R. 225	110
Davey v. London and South Western Railway Co., 12 Q. B. D. 70; 53 L. J. Q. B. 58; 49 L. T. 739	162
— v. Shannon, 4 Ex. D. 81; 48 L. J. Ex. 459; 40 L. T. 628; 27 W. R. 599	17
Davidson v. Stanley, 2 M. & G. 721; 58 R. R. 556	195
Davies v. Davies, 9 C. & P. 87	117
— v. Davies, 36 Ch. D. 359; 56 L. J. Ch. 962; 58 L. T. 209; 36 W. R. 86	52, 57

Davies v. Ebbw Vale Urban Council, 75 J. P. 533; 9 L. G. R. 1226; 27 T. L. R. 543	84
— v. England, 33 L. J. Q. B. 321; 10 Jur. (N. S.) 1235	160
— & Co. v. Lowen, 64 L. T. 655; 7 T. L. R. 496	51
— v. Makuna, 29 Ch. D. 596; 54 L. J. Ch. 1148; 52 L. T. 472; 33 W. R. 668	20
— v. Mann, 10 M. & W. 546; 12 L. J. Ex. 10; 62 R. R. 698	230, 231
— v. Snead, L. R. 5 Q. B. 608; 39 L. J. Q. B. 202; 23 L. T. 126	292
— v. Thomas, [1920] 2 Ch. 189; 89 L. J. Ch. 338; 123 L. T. 456; 36 T. L. R. 571	169
— v. Thomas Owen & Co., Ltd., [1919] 2 K. B. 39; 88 L. J. K. B. 887; 121 L. T. 156; 83 J. P. 193	161, 163, 164
— v. Vernon, 6 Q. B. 443; 14 L. J. Q. B. 30; 66 R. R. 457	263, 276
— v. Williams, 10 Q. B. 725; 16 L. J. Q. B. 369; 11 Jur. 750; 74 R. R. 491	86, 102
Davis v. Davis, [1894] 1 Ch. 393; 63 L. J. Ch. 219; 70 L. T. 265; 42 W. R. 312	30
— v. Foreman, [1894] 3 Ch. 654; 64 L. J. Ch. 187; 43 W. R. 168	62
— v. Jones, 17 C. B. 625; 25 L. J. C. P. 91; 4 W. R. 248	25
— v. Marshall, 4 L. T. 216; 9 W. R. 520	37
— v. Reeves, 5 Ir. C. L. R. 79	293
— v. Starr, 41 Ch. D. 242; 58 L. J. Ch. 808; 60 L. T. 797; 37 W. R. 481	115
Dawkins v. Paulet, L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 21 L. T. 584; 18 W. R. 336	298
— v. Rokeby, L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 33 L. T. 196; 23 W. R. 931	298
Day v. Bream, 2 M. & Rob. 54; 62 R. R. 778	277
Dean v. Hogg, 10 Bing. 345; 38 R. R. 443	236
— v. Peel, 5 East, 45; 7 R. R. 653	103
Debenham v. Mellon, 6 App. Cas. 24; 50 L. J. Q. B. 155; 43 L. T. 673; 29 W. R. 141	3, 4
De Bussche v. Alt, 8 Ch. D. 286; 47 L. J. Ch. 381; 38 L. T. 370	193
De Francesco v. Barnum (No. 1), 43 Ch. D. 165; 59 L. J. Ch. 151; 62 L. T. 40; 38 W. R. 187	22
— v. Barnum (No. 2), 45 Ch. D. 430; 60 L. J. Ch. 63; 63 L. T. 438; 39 W. R. 5; 6 T. L. R. 463	5, 7, 89
— v. Barnum (No. 3), 63 L. T. 514; 6 T. L. R. 486	90
Degg v. Midland Railway Co., 1 H. & N. 773; 26 L. J. Ex. 171; 28 L. T. 357; 5 W. R. 364	150
Delaney v. Fox, 2 C. B. (N. S.) 768; 26 L. J. C. P. 248	34
De Mattos v. Gibson, 4 De G. & J. 276; 28 L. J. Ch. 498	61
De Medina v. Norman, 9 M. & W. 820; 2 Dowl. (N. S.) 239; 11 L. J. Ex. 320; 60 R. R. 912	113
Devala Provident Gold Mining Co., <i>In re</i> , 22 Ch. D. 593; 52 L. J. Ch. 434; 48 L. T. 259; 31 W. R. 425	186
Devonald v. Rosser & Sons, [1906] 2 K. B. 728; 75 L. J. K. B. 688; 95 L. T. 232; 22 T. L. R. 682	27, 44
Dibbins v. Dibbins, [1896] 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137; 44 W. R. 595	177
Dickenson v. Fletcher, L. R. 9 C. P. 1; 43 L. J. M. C. 25; 29 L. T. 540	204
Dickson v. Reuter's Telegraph Co., 3 C. P. D. 1; 47 L. J. C. P. 1; 37 L. T. 370; 26 W. R. 2	217
Diggle v. London and Blackwall Railway Co., 5 Ex. 442; 19 L. J. Ex. 308	8
Dillingham v. Harrison, [1917] W. N. 305	5
Dingle v. Hare, 7 C. B. (N. S.) 145; 29 L. J. C. P. 143; 1 L. T. 38	183
Diplock v. Blackburn, 3 Camp. 43; 13 R. R. 744	92
Dixon v. Bell, 1 Stark. 287; 5 M. & S. 198; 17 R. R. 308	98, 99, 100, 105
— v. Fawcus, 3 E. & E. 537; 30 L. J. Q. B. 137; 3 L. T. 693; 9 W. R. 414	142
— v. Hamond, 2 B. & Ald. 310; 23 R. R. 675	70
— v. Parsons, 1 F. & F. 24	290
Dobbin v. Foster, 1 C. & K. 323; 70 R. R. 799	129
Dobson v. Collis, 1 H. & N. 81; 25 L. J. Ex. 267; 4 W. R. 512	17
— v. Jones, 5 M. & G. 112	32
Dodd v. Norris, 3 Camp. 519; 14 R. R. 832	101, 104, 105
Doe v. Baytop, 3 A. & E. 188; 4 L. J. K. B. 263; 42 R. R. 359	34
— v. Birchmore, 9 A. & E. 662; 8 L. J. Q. B. 108; 48 R. R. 629	34
— v. Bold, 11 Q. B. 127; 12 Jur. 350; 75 R. R. 607	214

	PAGE
Doe v. Goldwin 2 Q. B. 146 10 L. J. Q. B. 275; 57 R. R. 621	177
— v. Jones, 10 B. & C. 718; 34 R. R. 549	33
— v. M'Kaeg, 10 B. & C. 721; 34 R. R. 551	33
— v. Walters, 10 B. & C. 626; 8 L. J. (O. S.) K. B. 297; 34 R. R. 522 ...	177
— v. Willis, 5 Ex. 894	110
Doel v. Sheppard, 5 E. & B. 856; 25 L. J. Q. B. 124	162
Dollar v. Parkington, 84 L. T. 470	17
Donaldson v. Williams, 1 Cr. & M. 345; 2 L. J. Ex. 173; 3 Tryrw. 371; 36 R. R. 613	8, 74
Donellan v. Reade, 3 B. & Ad. 899; 1 L. J. K. B. 269; 37 R. R. 588	16
Donnell v. Bennett, 22 Ch. D. 835; 52 L. J. Ch. 414; 48 L. T. 68; 31 W. R. 316	61
Donovan v. Laing, Wharton, &c., Syndicate, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25; 68 L. T. 512; 41 W. R. 455; 9 T. L. R. 313	150, 234, 236
Doogood v. Rose, 9 C. B. 132; 19 L. J. C. P. 246	113
Doswell v. Impey, 1 B. & C. 163	280
Douglass v. Rhyll Urban District Council, [1913] 2 Ch. 407; 82 L. J. Ch. 537; 11 L. G. R. 1162; 109 L. T. 30; 77 J. P. 373; 29 T. L. R. 605; 57 S. J. 627	12
Dover v. Prosser, [1904] 1 K. B. 84; 73 L. J. K. B. 13; 89 L. T. 724; 52 W. R. 140; 20 T. L. R. 49	32
Dowden & Pook, Ltd., v. Pook, [1904] 1 K. B. 45; 73 L. J. K. B. 38; 89 L. T. 688; 52 W. R. 97; 20 T. L. R. 39	50, 53
Dowell v. General Steam Navigation Co., 5 E. & B. 195; 26 L. J. Q. B. 69 230, 231	
Down v. Pinto, 9 Ex. 327; 23 L. J. Ex. 103; 2 W. R. 202	37
Downman v. Williams, 7 Q. B. 103; 14 L. J. Q. B. 226; 68 R. R. 413 ...	256, 257
Drew v. Guy, [1894] 3 Ch. 25; 63 L. J. Ch. 547; 71 L. T. 220	56
— v. Nunn, 4 Q. B. D. 661; 48 L. J. Q. B. 591; 40 L. T. 671; 27 W. R. 810	197
Dry v. Davy, 10 A. & E. 30; 8 L. J. Q. B. 209; 50 R. R. 314	106
Dublin Corporation v. Hayes, Ir. Rep. 10 C. L. 226	21
Dublin, Wicklow and Wexford Railway Co. v. Slattery, 3 App. Cas. 1155; 39 L. T. 365; 27 W. R. 191	162
Dubowski & Sons v. Goldstein, [1896] 1 Q. B. 478; 65 L. J. Q. B. 397; 74 L. T. 180; 44 W. R. 436; 12 T. L. R. 259	54, 55, 58
Dudley and West Bromwich Bank v. Spittle, 1 John & H. 14; 2 L. T. 47; 8 W. R. 351	339
Duel v. Harding, Str. 595	98, 99
Dugdale v. Lovering, L. R. 10 C. P. 196; 44 L. J. C. P. 197; 32 L. T. 155; 23 W. R. 391	141
Duignan v. Walker, 1 Johns. 446; 28 L. J. Ch. 867; 7 W. R. 562	54
Dunkley v. Farris, 11 C. B. 457	209
Dunn v. Macdonald, [1897] 1 Q. B. 555; 66 L. J. Q. B. 420; 76 L. T. 444; 45 W. R. 355; 13 T. L. R. 292	259
— v. Murray, 9 B. & C. 780; 33 R. R. 327	115
— v. Reg., [1896] 1 Q. B. 116; 65 L. J. Q. B. 279; 73 L. T. 695; 44 W. R. 243; 12 T. L. R. 101	38
— v. Sayles, 5 Q. B. 685; 13 L. J. Q. B. 159	46
Dunne v. Anderson, 3 Bing. 88; Ry. & M. 287; 10 Moore, 407; 28 R. R. 591	297
Dunsley v. Westbrowne, 1 Str. 414	99
Dunston v. Imperial Gas Light Co., 3 B. & Ad. 125; 1 L. J. K. B. 49; 37 R. R. 352	12
Durham, Mayor of v. Fowler, 22 Q. B. D. 394; 58 L. J. Q. B. 246; 60 L. T. 456	106
Durrell v. Evans, 1 H. & C. 174; 31 L. J. Ex. 337; 7 L. T. 97; 10 W. R. 665	22
Dyer v. Munday, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448; 43 W. R. 440; 11 T. L. R. 282	208, 209, 210
— v. Pearson, 3 B. & C. 38; 27 R. R. 286	189
Dyer's Case, Y. B., 2 Hen. V., fo. 5, pl. 26	48
Dynen v. Leach, 26 L. J. Ex. 221; 5 W. R. 490	158

E.

EADDS v. Vandeput, 5 East, 39; 15 R. R. 461—463	92
Eager v. Grimwood, 1 Ex. 61; 16 L. J. Ex. 236; 74 R. R. 584	86, 100, 103
Earl v. Lubbock, [1905] 1 K. B. 253; 74 L. J. K. B. 121; 91 L. T. 830; 21 T. L. R. 71	173
Earle v. Kingscote [1900] 2 Ch. 585; 69 L. J. Ch. 725; 83 L. T. 377; 16 T. L. R. 511	5

	PAGE
Earle v. Rowcroft, 8 East, 126; 9 R. R. 385	229
East Anglian Railway Co. v. Lythgoe, 10 C. B. 726; 2 L. M. & P. 221; 20 L. J. C. P. 84	111
Eastern Counties Railway Co. v. Broom, 6 Ex. 314; 20 L. J. Ex. 196	214, 250
Eastland v. Burchell, 3 Q. B. D. 432; 47 L. J. Q. B. 500; 38 L. T. 563; 27 W. R. 290	3, 4
Easton v. Hitchcock, [1912] 1 K. B. 535; 51 L. J. K. B. 305; 106 L. T. 126; 28 T. L. R. 208	197
Eaton v. Basker, 7 Q. B. D. 529; 50 L. J. Q. B. 444; 44 T. L. 703; 29 W. R. 597	10
— v. Lake, 20 Q. B. D. 378; 57 L. J. Q. B. 227; 59 L. T. 100; 36 W. R. 277	94
— v. Swansea Waterworks, 17 Q. B. 267; 20 L. J. Q. B. 482	198
— v. Western, 9 Q. B. D. 636; 52 L. J. Q. B. 41	72
Edden v. Read, 3 Camp. 338	261
Eden, <i>Ex parte</i> , 2 M. & S. 226	22
— v. Ridsdale's Railway Lamp Co., 23 Q. B. D. 368; 58 L. J. Q. B. 579; 61 L. T. 444; 38 W. R. 55	65
Edgell v. Day, L. R. 1 C. P. 80; 35 L. J. C. P. 7; 13 L. T. 328; 14 W. R. 87 ..	260
Edisonia, Ltd., v. Forse, 25 R. P. C. 546	94
Edmondson v. Birch & Co., Ltd., and Horner, [1907] 1 K. B. 371; 76 L. J. K. B. 346; 96 L. T. 415; 23 T. L. R. 234	286
— v. Machell, 2 T. R. 4	99, 101
Edmunds v. Bnshell, L. R. 1 Q. B. 97; 35 L. J. Q. B. 20	189
Edmondson v. Render (No. 1), 90 L. T. 814	55
— v. — (No. 2), [1905] 2 Ch. 320; 74 L. J. Ch. 585; 93 L. T. 124; 53 W. R. 632	55
Edward v. Trevellick, 4 E. & B. 59; 24 L. J. Q. B. 9; 2 W. R. 586	72
Edwards v. Hodding, 5 Taunt. 815; 15 R. R. 662	263
— v. Levy, 2 F. & F. 94	77
— v. London and North Western Railway Co., L. R. 5 C. P. 445; 39 L. J. C. P. 241; 22 L. T. 656; 18 W. R. 534	224
— v. Midland Railway Co., 6 Q. B. D. 287; 50 L. J. Q. B. 281; 43 L. T. 694; 29 W. R. 609	214
Egerton v. Mathews, 6 East, 307; 2 Smith, 389	21
Ehrman v. Bartholomew, [1898] 1 Ch. 671; 67 L. J. Ch. 319; 78 L. T. 646; 46 W. R. 509; 14 T. L. R. 364	61
Elborough v. Ayres, L. R. 10 Eq. 367; 39 L. J. Ch. 601; 23 L. T. 68; 18 W. R. 913	85
Elderton v. Emmens, 6 C. B. 160; 17 L. J. C. P. 307; 13 C. B. 495; 4 H. L. C. 624	34, 113, 130
Eley v. Positive Government Security Life Assurance Co., 1 Ex. D. 20, 88; 45 L. J. Ex. 58, 451; 34 L. T. 190	10, 17, 43
Ellen v. Topp, 6 Ex. 424; 20 L. J. Ex. 241	72
Elliott v. Hall, 15 Q. B. D. 315; 54 L. J. Q. B. 518; 34 W. R. 16	172
— v. Nicklin, 5 Price, 641	101, 104
Ellis v. Goulton, [1893] 1 Q. B. 350; 62 L. J. Q. B. 232; 68 L. T. 144; 41 W. R. 411; 9 T. L. R. 223	259, 260
— v. London and South Western Railway Co., 2 H. & N. 424; 26 L. J. Ex. 349	229
— v. Sheffield Gas Co., 2 E. & B. 767; 23 L. J. Q. B. 42; 2 W. R. 19	240
Ellwood v. Liverpool Victoria Legal Friendly Society, 42 L. T. 694	93
Elves v. Croft, 10 C. B. 241; 19 L. J. C. P. 385	53
Emary v. Nolloth, [1903] 2 K. B. 264; 72 L. J. K. B. 620; 89 L. T. 100; 52 W. R. 107; 19 T. L. R. 530	203
Emerson v. Blonden, 1 Esp. 142; 5 R. R. 725	174
Emmens v. Elderton, 13 C. B. 495; 4 H. L. C. 624	43, 46
— v. Pottle, 16 Q. B. D. 354; 55 L. J. Q. B. 51; 53 L. T. 808; 34 W. R. 116	211, 277
Engelhart v. Farrant & Co., [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 75 L. T. 617; 45 W. R. 179; 13 T. L. R. 81	226
English Joint Stock Bank, <i>In re</i> ; Harding, <i>Ex parte</i> , 3 Eq. 341; 15 L. T. 529	126
—; Yelland's Case, L. R. 4 Eq. 350	128
English and Scottish Marine Insurance Co., <i>In re</i> ; MacIure's Claim, L. R. 5 Ch. 737; 39 L. J. Ch. 685; 23 L. T. 685; 18 W. R. 1122	128
Ernest v. Nicholls, 6 H. L. C. 401; 6 W. R. 24	180
Etherington v. Parrot, 1 Salk. 118	4
Evans v. Birch, 3 Camp. 10	71

Evans v. Hoare, [1892] 1 Q. B. 593; 61 L. J. Q. B. 470; 66 L. T. 345; 40 W. R. 442; 8 T. L. R. 441	22
— v. Roe, L. R. 7 C. P. 138; 26 L. T. 70	27, 36
— v. Walton, L. R. 2 C. P. 615; 36 L. J. C. P. 307; 17 L. T. 92; 15 W. R. 1062	89
— v. Ware, [1892] 3 Ch. 502; 62 L. J. Ch. 256; 67 L. T. 285	7, 51, 60

F.

FAIRLIE v. Hastings, 10 Ves. 123	186
Fairman v. Ives, 5 B. & Ald. 642; 24 R. R. 514	297
— v. Oakford, 5 H. & N. 635; 29 L. J. Ex. 459	35, 40
Farquharson Bros. & Co. v. King & Co., [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810; 51 W. R. 94	178
Farrant v. Barnes, 11 C. B. (N. S.) 553; 31 L. J. C. P. 137	274
Farrow v. Wilson, L. R. 4 C. P. 744; 38 L. J. C. P. 326; 20 L. T. 810; 18 W. R. 43	130
Farwell v. Boston and Worcester Railroad Corporation, 45 Mass. (4 Metc.) 49 ...	145
Fawcett v. Beavres, 2 Lev. 63	90
Fawcett v. Cash, 5 B. & Ad. 904; 3 L. J. K. B. 113; 39 R. R. 709	34, 38
Feather v. Reg., 6 B. & S. 257; 35 L. J. Q. B. 200; 12 L. T. 114	251, 279
Fechter v. Montgomery, 33 Beav. 22	62
Federal Supply and Cold Storage Co. of South Africa v. Angehrn, 80 L. J. P. C. 1; 103 L. T. 150; 26 T. L. R. 626	74, 78
Fell v. Knight, 8 M. & W. 269; 10 L. J. Ex. 277; 58 R. R. 698	206
Feltham v. England, L. R. 2 Q. B. 33; 36 L. J. Q. B. 14; 15 W. R. 151	153
Fenn v. Harrison, 3 T. R. 757	183, 191
Fenton v. City of Dublin Steam Packet Co., 8 A. & E. 835; 8 L. J. Q. B. 28; 47 R. R. 743	236
Ferns v. Carr, 28 Ch. D. 409; 54 L. J. Ch. 478; 52 L. T. 348; 33 W. R. 363 ...	131
Fewings v. Tisdal, 1 Ex. 295; 17 L. J. Ex. 18	113, 116
Filby v. Hounsell, [1896] 2 Ch. 737; 65 L. J. Ch. 852; 75 L. T. 270; 45 W. R. 232; 12 T. L. R. 612	18
Fillieul v. Armstrong, 7 A. & E. 557; 7 L. J. Q. B. 7	79
Filliter v. Phippard, 11 Q. B. 347; 17 L. J. Q. B. 89; 12 Jur. 202; 75 R. R. 401	210
Finucane v. Small, 1 Esp. 315	244
Firbank's Executors v. Humphreys, 18 Q. B. D. 54; 56 L. J. Q. B. 57; 56 L. T. 36; 35 W. R. 92	259
Firth v. Staines, [1897] 2 Q. B. 70; 66 L. J. Q. B. 510; 76 L. T. 496; 45 W. R. 575; 13 T. L. R. 394	251
Fisher v. Jackson, [1891] 2 Ch. 84; 60 L. J. Ch. 482; 64 L. T. 782; 7 T. L. R. 358	110
— v. Marsh, 34 L. J. Q. B. 177; 12 L. T. 604; 13 W. R. 834	254
Fishmongers' Co. v. Robertson, 5 M. & G. 131; 12 L. J. C. P. 185; 63 R. R. 242	13
Fitz v. Iles, [1893] 1 Ch. 77; 62 L. J. Ch. 258; 63 L. T. 108	57
Fitzmaurice v. Bayley, 6 E. & B. 868	22
Fleming v. Bank of New Zealand, [1900] A. C. 577; 69 L. J. P. C. 120; 83 L. T. 1; 16 T. L. R. 469	177
Flemington v. Smithers, 2 C. & P. 292	98
Fleming v. Hector, 2 M. & W. 172; 6 L. J. Ex. 43; 46 R. R. 553	193
Fletcher v. Krell, 42 L. J. Q. B. 55; 28 L. T. 105	108
Florence, The, 16 Jur. 572	119
Flower v. London & North Western Railway Co., [1894] 2 Q. B. 65; 63 L. J. Q. B. 547; 70 L. T. 829; 42 W. R. 519; 10 T. L. R. 427	6, 7
Foley v. Parry, 2 M. & K. 138; 39 R. R. 163	348
Food v. Morley, 1 F. & F. 496	116
Forbes v. Cochrane, 2 B. & C. 448; 26 R. R. 402	90
— v. Marshall, 11 Ex. 166; 24 L. J. Ex. 305; 3 W. R. 480	180
Foreman v. Canterbury, Mayor of, L. R., 6 Q. B. 214; 40 L. J. Q. B. 138; 24 L. T. 385; 19 W. R. 719	232, 253
Fores v. Wilson, Peake, 55; 3 R. R. 652	88, 100, 101
Forgan v. Burke, 12 Ir. C. L. R. 495	37, 41
Forman & Co. Proprietary, Ltd., v. The Liddesdale, [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331	132, 176

	PAGE
Forrest, <i>In re</i> , <i>Bubb v. Newcomb</i> , [1916] 2 Ch. 386; 85 L. J. Ch. 784; 115 L. T. 476; 32 T. L. R. 656	344
Forster, <i>In re</i> , 19 L. R. Ir. 240	126
Fosset <i>v. Breer</i> , 3 Keb. 59	90
Foster <i>v. Essex Bank</i> , 17 Mass. 479	244
— <i>v. Smith</i> , 18 C. B. 156; 4 W. R. 495	177
— <i>v. Stewart</i> , 3 M. & S. 191; 15 R. R. 459	92
Foulger <i>v. Newcomb</i> , L. R., 2 Ex. 327; 36 L. J. Ex. 169; 16 L. T. 595; 15 W. R. 1181	285
Foulkes <i>v. Metropolitan District Railway Co.</i> , 5 C. P. D. 157; 49 L. J. C. P. 361; 42 L. T. 345; 28 W. R. 526	99, 213, 274
Fountain <i>v. Boodle</i> , 3 Q. B. 5; 61 R. R. 121	288, 299
Fowler <i>v. Lock</i> , L. R. 7 C. P. 272; L. R. 10 C. P. 90; 43 L. J. C. P. 394; 31 L. T. 844; 23 W. R. 415	34, 211
Fox, <i>Ex parte. In re, Smith</i> ; 17 Q. B. D. 4; 55 L. J. Q. B. 288; 54 L. T. 307; 34 W. R. 535	126
— <i>v. Broderick</i> , 14 Ir. C. L. R. 453	286
Fox-Bourne <i>v. Vernon & Co.</i> , 10 T. L. R. 647	40
Foxall <i>v. International Land Credit Co.</i> , 16 L. T. 637	40
Frank <i>v. Edwards</i> , 8 Ex. 214; 22 L. J. Ex. 42	106
Franklyn <i>v. Lamond</i> , 4 C. B. 637; 16 L. J. C. P. 221; 72 R. R. 671	254
Fraser <i>v. Pape</i> , 91 L. T. 340	16
Frazer <i>v. Bunn</i> , 8 C. & P. 704	24
— <i>v. Hatton</i> , 2 C. B. N. S. 512; 26 L. J. C. P. 226	118
Freeman <i>v. Cooke</i> , 2 Ex. 654; 18 L. J. Ex. 114; 12 Jur. 777; 76 R. R. 711 ..	177
— <i>v. Rosher</i> , 13 Q. B. 780; 18 L. J. Q. B. 340; 13 Jur. 881; 78 R. R. 514 ..	211
French <i>v. Brookes</i> , 6 Bing. 354; 4 M. & P. 11	114
— <i>v. Macale</i> , 2 Dr. & W. 269	59
Frost <i>v. Knight</i> , L. R. 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471	109, 110
Fryer <i>v. Kinnersley</i> , 15 C. B. N. S. 422; 33 L. J. C. P. 96; 9 L. T. 415; 12 W. R. 155	290, 300
Fyler <i>v. Fyler</i> , 3 Beav. 550; 5 Jur. 187; 52 R. R. 217	71

G.

GADD <i>v. Houghton</i> , 1 Ex. D. 357; 46 L. J. Ex. 71; 35 L. T. 222; 24 W. R. 975 ..	257
— <i>v. Thompson</i> , [1911] 1 K. B. 304; 80 L. J. K. B. 272; 103 L. T. 836; 55 S. J. 156; 27 T. L. R. 113	7, 23
Gallagher <i>v. Piper</i> , 16 C. B. N. S. 669; 33 L. J. C. P. 329; 10 L. T. 718; 12 W. R. 988	153
Galsworthy <i>v. Strutt</i> , 1 Ex. 659; 17 L. J. Ex. 226; 74 R. R. 812	58
Gannon <i>v. Housatonic Railroad Co.</i> , 17 Amer. Rep. 82	145
Gardner <i>v. Moulst</i> , 10 A. & E. 464; 8 L. J. Q. B. 270; 50 R. R. 480	186
— <i>v. Slade</i> , 13 Q. B. 796; 18 L. J. Q. B. 336	288
Garth <i>v. Howard</i> , 8 Bing. 451; 5 C. & P. 346; 1 L. J. C. P. 129; 34 R. R. 753 ..	186
Gas Light and Coke Co. <i>v. Turner</i> , 6 Bing., N. C. 327; 9 L. J. Ex. 336; 54 R. R. 808	20
Gates <i>v. R. Bill and Son</i> [1902] 2 K. B. 38; 71 L. J. K. B. 702; 87 L. T. 288; 50 W. R. 546; 18 T. L. R. 592	211
Gauntlett <i>v. King</i> , 3 C. B. N. S. 59	211
Gayford <i>v. Nicholls</i> , 9 Ex. 702; 23 L. J. Ex. 205	238
Geake <i>v. Jackson</i> , 36 L. J. C. P. 108; 15 L. T. 509; 15 W. R. 338	180
General Accident Assurance Co. <i>v. Noel</i> , [1902] 1 K. B. 377; 71 L. J. K. B. 236; 86 L. T. 555; 50 W. R. 381; 18 T. L. R. 164	60
General Billposting Co. Ltd. <i>v. Atkinson</i> , [1909] A. C. 118; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178	116
General Rolling Stock Co., <i>In re, Chapman's Case</i> , 1 Eq. 346; 14 L. T. 742 ..	126
Gent <i>v. Harrison</i> , 69 L. T. 307	60
George <i>v. Davies</i> , [1911] 2 K. B. 445; 80 L. J. K. B. 924; 104 L. T. 648; 27 T. L. R. 415	38, 135
George Newman & Co., <i>In re</i> , [1895] 1 Ch. 674; 64 L. J. Ch. 407; 72 L. T. 697; 43 W. R. 483	117
German Mining Co., <i>In re</i> , 22 L. J. Ch. 926	187
Gibbs <i>v. Liverpool Docks Trustees</i> , 3 H. & N. 164; 27 L. J. Ex. 321; 6 W. R. 361	208

	PAGE
Giblan <i>v.</i> National Amalgamated Labourers' Union [1903] 2 K. B. 600; 72 L. J. K. B. 907; 89 L. T. 386; 19 T. L. R. 708	171
Giblin <i>v.</i> M'Mullen, L. R., 2 P. C. 317; 38 L. J. P. C. 25; 21 L. T. 214; 17 W. R. 445	244
Gibson <i>v.</i> East India Co., 5 Bing. N. C. 262; 8 L. J. C. P. 193; 50 R. R. 688	9, 12
— <i>v.</i> Holland, L. R., 1 C. P. 1; 35 L. J. C. P. 5; 13 L. T. 293; 14 W. R. 86	18
— <i>v.</i> Lawson, [1891] 2 Q. B. 545; 61 L. J. M. C. 9; 65 L. T. 573; 7 T. L. R. 651	86
Gidley <i>v.</i> Lord Palmerston, 3 Brod. & B. 275; 24 R. R. 668	265, 274
Gilbert <i>v.</i> Schwenck, 14 M. & W. 488; 14 L. J. Ex. 317; 9 Jur. 693; 59 R. R. 745	6, 98
— <i>v.</i> Trinity House, 17 Q. B. D. 795; 56 L. J. Q. B. 85; 35 W. R. 30 ...	251
Giles <i>v.</i> Taff Vale Railway Co., 2 E. & B. 822; 23 L. J. Q. B. 43	214
Gilman <i>v.</i> Robinson, Ry. & M. 226; 1 C. & P. 642; 28 R. R. 795	178, 189
Giraud <i>v.</i> Richmond, 2 C. B. 835; 15 L. J. C. P. 180; 69 R. R. 620	17, 27
Gladman <i>v.</i> Johnson, 36 L. J. C. P. 153; 15 L. T. 476; 15 W. R. 313	209
Gladney <i>v.</i> Murphy, 26 L. R. Ir. 651	102
Glasgow Corporation <i>v.</i> Lorimer, [1911] A. C. 209; 80 L. J. P. C. 175; 104 L. T. 354	214
Gloucester Municipal Election Petition, 1900, Ford <i>v.</i> Newth, [1901] 1 K. B. 683; 70 L. J. K. B. 459; 84 L. T. 354; 65 J. P. 391	177
Gloucestershire Banking Co. <i>v.</i> Edwards, 20 Q. B. D. 107; 57 L. J. Q. B. 51; 58 L. T. 463; 36 W. R. 116	280
Glover <i>v.</i> London and North Western Railway Co., 5 Ex. 66; 19 L. J. Ex. 172 ...	238
Godsall <i>v.</i> Boldero, 9 East, 72	89
Goff <i>v.</i> Great Northern Railway Co., 3 E. & E. 672; 30 L. J. Q. B. 148; 3 L. T. 850	223, 224
Goodall <i>v.</i> Lowndes, 6 Q. B. 464; 9 Jur. 177; 66 R. R. 463	262
Goodman <i>v.</i> Kennell, 3 C. & P. 167; 6 L. J. (O. S.) C. P. 61	228
— <i>v.</i> Pocock, 15 Q. B. 576; 19 L. J. Q. B. 410	116
Goodyear <i>v.</i> Weymouth [Mayor of], 35 L. J. C. P. 12	122
Gophir Diamond Co. <i>v.</i> Wood, [1902] 1 Ch. 950; 71 L. J. Ch. 550; 86 L. T. 801; 50 W. R. 603; 18 T. L. R. 492	56
Gordon <i>v.</i> Potter, 1 F. & F. 644	38
Gorris <i>v.</i> Scott, L. R., 9 Ex. 125; 43 L. J. Ex. 92; 30 L. T. 431; 22 W. R. 575 ...	162
Gosling <i>v.</i> Birnie, 7 Bing. 339; 33 R. R. 497	70
Goss <i>v.</i> Lord Nugent, 5 B. & Ad. 58; 2 L. J. K. B. 127; 39 R. R. 392	27
Gough, <i>Ex parte</i> , Mont. & B. 417	128
— <i>v.</i> Findon, 7 Ex. 48; 21 L. J. Ex. 58	125
Gould <i>v.</i> Stuart, [1896] A. C. 575; 65 L. J. P. C. 82; 75 L. T. 110	38
— <i>v.</i> Webb, 4 E. & B. 933; 24 L. J. Q. B. 205; 3 W. R. 399	82
Grace <i>v.</i> Newman, 19 Eq. 623; 44 L. J. Ch. 298; 23 W. R. 517	96
Gracey <i>v.</i> Belfast Tramways Co., [1901] 2 Ir. R. 322	221
Graeme <i>v.</i> Wroughton, 11 Ex. 146; 24 L. J. Ex. 265; 3 W. R. 509	20
Grafton <i>v.</i> Eastern Counties Railway Co., 8 Ex. 699	122
Graham <i>v.</i> Commissioners of Public Works, [1901] 2 K. B. 781; 70 L. J. K. B. 860; 85 L. T. 96; 50 W. R. 122	259
Grand Trunk Railway <i>v.</i> Cummings, 106 U. S. 700	156
Granger <i>v.</i> Dacre, 12 M. & W. 431; 1 D. & L. 573; 13 L. J. Ex. 93	113
Grant <i>v.</i> Gold Exploration Syndicate, [1900] 1 Q. B. 233; 69 L. J. Q. B. 150; 82 L. T. 5; 48 W. R. 278; 16 T. L. R. 86	66
— <i>v.</i> Maddox, 15 M. & W. 737; 16 L. J. Ex. 227; 71 R. R. 815	29
— <i>v.</i> Norway, 10 C. B. 665; 20 L. J. C. P. 93	229
Gratland <i>v.</i> Freeman, 3 Esp. 85	196
Graveley <i>v.</i> Barnard, 18 Eq. 518; 43 L. J. Ch. 659; 30 L. T. 863	60
Gray <i>v.</i> Pullen, 5 B. & S. 970; 34 L. J. Q. B. 265; 11 L. T. 569; 13 W. R. 257 ...	241
— <i>v.</i> Smith, 43 Ch. D. 208; 59 L. J. Ch. 145; 62 L. T. 335; 38 W. R. 310 ...	18
Graydon, <i>In re</i> , [1896] 1 Q. B. 417; 65 L. J. Q. B. 328; 74 L. T. 175; 44 W. R. 495; 3 Mans. 5	15
Great Eastern, The, L. R., 1 A. & E. 384; 36 L. J., Adm. 15; 17 L. T. 228 ...	116
Great Western Railway Co. <i>v.</i> Goodman, 12 C. B. 313; 21 L. J. C. P. 197 ...	212
— <i>v.</i> McCarthy, 12 App. Cas. 218; 56 L. J. C. P. 33; 56 L. T. 582; 35 W. R. 429	212
— <i>v.</i> Rimell, 18 C. B. 575; 27 L. J. C. P. 201 ...	212

	PAGE
Great Western Railway Co. v. Willis, 18 C. B. (N. S.) 748; 34 L. J. C. P. 195; 12 L. T. 349	187
Green v. Marsden, 1 Drew. 646	348
— v. New River Co., 4 T. R. 589	69
— v. Price, 13 M. & W. 695; 16 M. & W. 346; 14 L. J. Ex. 105; 16 L. J. Ex. 108	58
— v. Roberts, 47 Barb. 521	117
— v. Thompson, [1899] 2 Q. B. 1; 68 L. J. Q. B. 719; 80 L. T. 691; 48 W. R. 31	7
Greenland v. Chaplin, 5 Ex. 243; 19 L. J. Ex. 293	227
Greenway v. Fisher, 1 C. & P. 190	275
— v. Hurd, 4 T. R. 553	260, 261
Greenwood's Case, 3 De G. M. & G. 459; 18 Jur. 387	180
Gregory v. Cotterell, 5 E. & B. 571; 25 L. J. Q. B. 33; 4 W. R. 48	181, 209
— v. Piper, 9 B. & C. 591; 33 R. R. 268	249
— v. Slowman, 1 E. & B. 360	276
Gregson v. Watson, 34 L. T. 143	132
Grellier, <i>Ex parte</i> , Mont. 264	127
Griffith v. Tower Publishing Co., [1897] 1 Ch. 21; 66 L. J. Ch. 12; 75 L. T. 330; 45 W. R. 73	1
Griffiths v. Dudley, Earl of, 9 Q. B. D. 357; 51 L. J. Q. B. 543; 47 L. T. 10; 30 W. R. 797	143, 165
— v. Jones, 15 Eq. 279; 42 L. J. Ch. 468; 21 W. R. 470	179
— v. London and St. Katharine's Dock Co., 13 Q. B. D. 259; 53 L. J. Q. B. 504; 51 L. T. 533; 33 W. R. 35	160
— v. Teetgen, 15 C. B. 344; 24 L. J. C. P. 35; 3 W. R. 11	103
Grill v. General Iron Screw Collier Co., L. R., 3 C. P. 476; 37 L. J. C. P. 205; 18 L. T. 485; 16 W. R. 796	213
Grimston v. Cuninghame, [1894] 1 Q. B. 125	61
Grinnell v. Wells, 7 M. & G. 1033; 2 D. & L. 610; 14 L. J. C. P. 19; 8 Jur. 1101; 66 R. R. 835	86, 100, 101
Groenvelt v. Burwell, 1 Lord Raym. 454	280
Grove v. Johnston, 24 L. R. Ir. 352	64
Groves v. Wimborne, Lord, [1898] 2 Q. B. 402; 67 L. J. Q. B. 862; 79 L. T. 284; 47 W. R. 87; 14 T. L. R. 493	148, 162, 164
Grundon v. Master and Co., 1 T. L. R. 205	40
Grundy v. Sun Printing and Publishing Association, 33 T. L. R. 77	40
Grylls v. Davies, 2 B. & Ad. 514	142, 277
Gwilliam v. Twist, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474; 72 L. T. 579; 43 W. R. 566; 11 T. L. R. 415	187, 193, 222
Gye v. Felton, 4 Taunt. 876	89
Gylbert v. Fletcher, Cro. Car. 179	22, 73

H.

HAIGH v. North Bierley Union, E. B. & E. 873; 28 L. J. Q. B. 62; 6 W. R. 679	13
Halbot v. Lens, [1901] 1 Ch. 344; 70 L. J. Ch. 125; 83 L. T. 702; 49 W. R. 214	259
Hall v. Ashurst, 1 Cr. & M. 714; 2 L. J. Ex. 295	257
— v. Hollander, 4 B. & C. 660; 28 R. R. 437	86, 98
— v. Johnson, 3 H. & C. 589; 34 L. J. Ex. 222; 11 L. T. 779; 13 W. R. 411	153
— v. Lees, [1904] 2 K. B. 602; 73 L. J. K. B. 819; 91 L. T. 20; 53 W. R. 17; 20 T. L. R. 678	234
— v. Smith, 2 Bing. 156; 9 Moore, 477	208, 252
— v. Swansea [Mayor of], 5 Q. B. 526; 13 L. J. Q. B. 107; 64 R. R. 564	9
— v. Wright, E. B. & E. 746; 27 L. J. Q. B. 345; 29 L. J. Q. B. 43; 8 W. R. 160	136
Hall's Case, 1 Mod. 76	205
Hambro v. Burnand, [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 583; 9 Com. Cas. 251; 20 T. L. R. 398	175
— v. Hull and London Fire Insurance Co., 3 H. & N. 789; 28 L. J. Ex. 62 179, 195	
Hamilton v. Bryant, 30 T. L. R. 408	40
— v. Long, [1903] 2 Ir. R. 407; [1905] 2 Ir. R. 552	4, 102
— v. Outram, 17 Fras. M. & McP. 798	32
Hamlyn v. Houston, [1903] 1 K. B. 81; 72 L. J. K. B. 72; 87 L. T. 500; 51 W. R. 99; 19 T. L. R. 66	208, 209

Hamlyn & Co. v. Wood & Co., [1891] 2 Q. B. 488; 60 L. J. Q. B. 734; 65 L. T. 286; 40 W. R. 24; 7 T. L. R. 731	42
Hammack v. White, 11 C. B. (N. S.) 588; 31 L. J. C. P. 129; 5 L. T. 676; 10 W. R. 230	213
Hamon v. Falle, 4 App. Cas. 247; 48 L. J. P. C. 45	285
Hanbury v. Ireland, Cro. Jac. 618	86
Hancock v. York, Newcastle & Berwick Railway Co., 10 C. B. 348	208
Hands v. Slaney, 8 T. R. 578	5
Hanley v. Pease & Partner, Ltd., [1915] 1 K. B. 698; 84 L. J. K. B. 532; 112 L. T. 823; 79 J. P. 230	64
Hanrahan v. Ardnamult Steamship Co., 22 L. R. Ir. 55	159
Hanson v. Roberdeau, Peake, 163	254
— v. Royden, L. R. 3 C. P. 47; 37 L. J. C. P. 69; 17 L. T. 214; 16 W. R. 205	119
— v. Waller, [1901] 1 K. B. 390; 70 L. J. K. B. 231; 84 L. T. 91; 17 T. L. R. 162; 49 W. R. 445	225
Hardaker v. Idle District Council, [1896] 1 Q. B. 335; 65 L. J. Q. B. 363; 74 L. T. 69; 44 W. R. 323; 12 T. L. R. 207	237, 242
Hardie v. Addie & Co., 20 Ct. Sess. Cas. (2nd Ser.) 553; 21 C. S. Cas. (2nd Ser.) 1382 n.	153
Hardman v. Willcock, 9 Bing. 382, <i>note</i> ; 35 R. R. 566	71, 260
Hardwicke (Earl of) v. Vernon, 14 Ves. 504; 9 R. R. 329	70
Harmer v. Cornelius, 5 C. B. (N. S.) 236; 28 L. J. C. P. 85; 6 W. R. 749 ...	82, 84
Harper v. Linthorpe Dinsdale Smelting Co., 101 L. T. 608; 26 T. L. R. 32... ..	116
— v. Luffkin, 7 B. & C. 387; 31 R. R. 236	102, 103
Harrington v. Churchward, 29 L. J. Ch. 521; 2 L. T. 114; 8 W. R. 302	31
— v. Victoria Graving Dock, 3 Q. B. D. 549; 47 L. J. Q. B. 594; 39 L. T. 120; 26 W. R. 740	65
Harris, <i>Ex parte</i> , 1 De G. 165	128
— v. Best, 68 L. T. 76	237
— v. Butler, 2 M. & W. 539; 6 L. J. Ex. 133; 46 R. R. 695	102, 103
— v. Carter, 3 E. & B. 559; 23 L. J. Q. B. 295; 2 W. R. 409	119
— v. Thompson, 13 C. B. 333	289, 291, 299
— v. Watson, Peake, 72; 3 R. R. 654	118
Harrison <i>ats.</i> — 12 Mod. 346	178, 197
— v. Bush, 5 E. & B. 344; 25 L. J. Q. B. 25; 3 W. R. 474	296, 298
— v. Leaper, 5 L. T. 640; 26 J. P. 69, 673	205
Harsant v. Blaine, Macdonald & Co., 56 L. J. Q. B. 511; 3 T. L. R. 689	70
Hart v. Aldridge, Cowp. 54	86
Hartley v. Cummings, 5 C. B. 247; 17 L. J. C. P. 84; 12 Jur. 57; 75 R. R. 722	19, 20, 47, 60
— v. Harman, 11 A. & E. 798; 9 L. J. Q. B. 179	113
— v. Ponsonby, 7 E. & B. 872; 26 L. J. Q. B. 322; 5 W. R. 659	119
Hartley's Trusts, <i>In re</i> , 47 L. J. Ch. 610; 26 W. R. 590	347
Haseler v. Lemoyne, 5 C. B. (N. S.) 530; 28 L. J. C. P. 103; 7 W. R. 14 ...	211
Hastings, Limited v. Pearson, [1893] 1 Q. B. 62; 67 L. T. 553; 41 W. R. 127; 9 T. L. R. 18	186
— v. Whitley, 2 Ex. 611	53
Hatton v. Kean, 7 C. B. (N. S.) 268; 29 L. J. C. P. 20; 1 L. T. 10; 8 W. R. 7	96
— v. Macready, 2 D. & L. 5	111
Havana Exploration Co., Ltd., <i>In re</i> , Nathan's Claim, [1916] 1 Ch. 8; 85 L. J. Ch. 174; 114 L. T. 16	127
Hawken v. Bourne, 8 M. & W. 703; 10 L. J. Ex. 361; 58 R. R. 853	189
Hawtayne v. Bourne, 7 M. & W. 595; 10 L. J. Ex. 224; 56 R. R. 806 ...	187, 195
Hayman v. Rugby School Governing Body, 18 Eq. 28; 43 L. J. Ch. 834; 30 L. T. 217; 22 W. R. 587	110
Haynes v. Doman, [1899] 2 Ch. 13; 68 L. J. Ch. 419; 80 L. T. 569; 15 T. L. R. 354	50, 51, 52, 53
Hayward v. Drury Lane Theatre, Ltd., and Moss Empires, Ltd., [1917] 2 K. B. 899; 117 L. T. 523; 33 T. L. R. 557; 61 S. J. 664	150
Hazard v. Treadwell, 1 Str. 506	178
Heald v. Kenworthy, 10 Ex. 739; 24 L. J. Ex. 76	179
Healey v. Société Anonyme Française Rubastic, [1917] 1 K. B. 946; 86 L. J. K. B. 1254; 117 L. T. 92; 33 T. L. R. 300	134
Hearne v. Garton, 2 E. & E. 66; 28 L. J. M. C. 16; 7 W. R. 566	205
Hearson v. Churchill, [1892] 2 Q. B. 144; 61 L. J. Q. B. 569; 66 L. T. 843; 40 W. R. 615; 8 T. L. R. 579	38

	PAGE
Heath v. Wilson, 2 M. & Rob. 181	219
Heaven v. Pender, 11 Q. B. D. 503; 52 L. J. Q. B. 702; 49 L. T. 357	173
Hebditch v. MacIlwaine, [1894] 2 Q. B. 54; 63 L. J. Q. B. 587; 70 L. T. 826; 42 W. R. 422; 10 T. L. R. 387	287, 288, 296, 297
Hedges v. Tagg, L. R. 7 Ex. 283; 41 L. J. Ex. 169; 20 W. R. 976	102, 103
Hedley v. Pinkney & Sons' Steamship Co., [1894] A. C. 222; 61 L. J. Q. B. 179; 66 L. T. 71; 40 W. R. 113; 10 T. L. R. 347	148, 153, 154
Helmore v. Smith (2), 35 Ch. D. 449; 56 L. J. Ch. 145; 56 L. T. 72; 35 W. R. 49	68
Helyear v. Hawke, 5 Esp. 72	183, 185
Hemingway v. Hamilton, 4 M. & W. 115; 51 R. R. 497	108
Hemming v. Hale, 7 C. B. (N. S.) 487; 29 L. J. C. P. 137; 8 W. R. 116	259
Hemmings v. Stoke Poges Golf Club, Ltd., [1920] 1 K. B. 720; 89 L. J. K. B. 744; 122 L. T. 479; 36 T. L. R. 77	33
Henderson v. Australian Royal Mail Co., 5 E. & B. 409; 24 L. J. Q. B. 322; 3 W. R. 571	12
— v. Midland Railway Co., 24 L. T. 881; 20 W. R. 23	214
— v. Rothschild, 33 Ch. D. 459; 55 L. J. Ch. 939; 56 L. J. Ch. 471; 56 L. T. 98; 35 W. R. 485	265
Henkel v. Pape, L. R. 6 Ex. 7; 40 L. J. Ex. 15; 23 L. T. 419; 19 W. R. 106	191
Henry Leetham & Sons, Ltd. v. Johnstone-White, [1907] 1 Ch. 322; 76 L. J. Ch. 304; 96 L. T. 348; 23 T. L. R. 254; 51 S. J. 113	55
Hepworth Manufacturing Co. v. Ryott, [1920] 1 Ch. 1; 89 L. J. Ch. 69; 122 L. T. 135	57
Herbert v. Reid, 16 Ves. 481	346
Hermann Loog v. Bean, 26 Ch. D. 306; 53 L. J. Ch. 1128; 51 L. T. 442; 32 W. R. 994	73
Hern v. Nichols, 1 Salk. 289	182
Hibbert v. Hibbert, 3 Mer. 681; 17 R. R. 169	349
Hibbs v. Ross, L. R. 1 Q. B. 534; 35 L. J. Q. B. 193; 15 L. T. 67; 14 W. R. 914	235
Hickin, <i>Ex parte</i> , 19 L. J., Bank. 8; 3 De G. & S. 662	128
Hickman v. Kent or Romney Marsh Sheepbreeders' Association, 37 T. L. R. 163	141
Higgins v. Senior, 8 M. & W. 834; 11 L. J. Ex. 199; 58 R. R. 884 ... 188, 255, ...	256
Higgs v. Maynard, 14 L. T. 332; 14 W. R. 658	248
Hill v. Allen, 1 Ves. Sen. 83	92
— v. Royds, 8 Eq. 290; 38 L. J. Ch. 538; 20 L. T. 842	265
— v. Thompson, 8 Taunt. 375; 20 R. R. 488	93
— v. Tottenham Urban Council, 79 L. T. 495	242
Hilliard v. Richardson, 3 Gray (69 Mass.) 349	239
Hillyer v. Governors of St. Bartholomew's Hospital, [1909] 2 K. B. 820; 78 L. J. K. B. 958; 101 L. T. 368; 73 J. P. 501; 25 T. L. R. 762	213, 234
Hinde v. Gray, 1 M. & G. 195; 9 L. J. C. P. 253; 56 R. R. 330	53
Hingston v. Kelly, 18 L. J. Ex. 360	120
Hinton v. Dibbin, 2 Q. B. 646; 11 L. J. Q. B. 113; 57 R. R. 754	212
Hippisley v. Knee Brothers, [1905] 1 K. B. 1; 74 L. J. K. B. 68; 92 L. T. 20; 21 T. L. R. 5	66
Hirst v. Tolson, 2 Mac. & G. 134; 19 L. J. Ch. 441; 80 R. R. 166	131
— v. West Riding Union Banking Co., [1901] 2 K. B. 560; 70 L. J. K. B. 828; 85 L. T. 3; 49 W. R. 715	174
Hiscox v. Batchellor, 15 L. T. 543	40
— v. Greenwood, 4 Esp. 174	194
Hitchcock v. Coker, 6 A. & E. 438; 6 L. J. Ex. 266; 45 R. R. 522	20, 49, 53
Hitchins v. Kilkenny Railway Co., 9 C. B. 536	11
Hobson v. Cowley, 27 L. J. Ex. 205; 6 W. R. 334	79, 129
Hochster v. de la Tour, 2 E. & B. 678; 22 L. J. Q. B. 455; 1 W. R. 469	109
Hodgson v. Sidney, L. R. 1 Ex. 313; 35 L. J. Ex. 182; 14 L. T. 624; 14 W. R. 923	101
Hodsoll v. Stallehrass, 11 A. & E. 301; 9 C. & P. 63; 9 L. J. Q. B. 132; 52 R. R. 350	98, 100
— v. Taylor, L. R. 9 Q. B. 79; 43 L. J. Q. B. 14; 29 L. T. 53; 22 W. R. 89	105
Hoey v. McEwan, 5 Ct. Sess. Cas., 3rd Ser., 814	129
Hoffman v. New York Central Railroad Co., 41 Amer. Rep. 337	229
Hogarth v. Wherley, L. R. 10 C. P. 630; 44 L. J. C. P. 330; 32 L. T. 800 ...	195
Hoggarth v. Taylor, L. R. 2 Ex. 105; 36 L. J. Ex. 61	113
Holcroft v. Barber, 1 C. & K. 4	28

	PAGE
Holder v. Soulbey, 8 C. B. (N. S.) 254; 29 L. J. C. P. 246; 2 L. T. 219; 8 W. R. 438	245
Hole v. Bradbury, 12 Ch. D. 886; 48 L. J. Ch. 673; 41 L. T. 153, 250; 28 W. R. 39	1
— v. Sittingbourne and Sheerness Railway Co., 6 H. & N. 488; 30 L. J. Ex. 81; 3 L. T. 750; 9 W. R. 274	241
Holl v. Griffin, 10 Bing. 246; 38 R. R. 817	70
Holland v. Russell, 4 B. & S. 14; 32 L. J. Q. B. 297; 8 L. T. 468; 11 W. R. 757	262
Holliday v. National Telephone Co., [1899] 2 Q. B. 392; 68 L. J. Q. B. 1016; 81 L. T. 252; 47 W. R. 658; 15 T. L. R. 483	242
Hollins v. Fowler, L. R. 7 H. L. 757; 44 L. J. Q. B. 169; 33 L. T. 73 ... 276, ...	277
Holloway v. Abell, 7 C. & P. 528; 48 R. R. 810	102
Holman v. Johnson, Cowp. 341	20
Holme v. Brunskill, 3 Q. B. D. 495; 47 L. J. Q. B. 610; 38 L. T. 838	106
Holmes v. Clark, 6 H. & N. 349; 7 H. & N. 937; 30 L. J. Ex. 135; 31 L. J. Ex. 356; 9 L. T. 178; 9 W. R. 419	144
— v. Higgins, 1 B. & C. 74	123
— v. Mather, L. R. 10 Ex. 261; 44 L. J. Ex. 176; 33 L. T. 361; 23 W. R. 869	248
— v. Mitchell, 7 C. B. (N. S.) 361; 28 L. J. C. P. 301; 6 Jur. (N. S.) 73	17
— v. North Eastern Railway Co., L. R. 4 Ex. 254; 38 L. J. Ex. 161; affirmed L. R. 6 Ex. 123; 40 L. J. Ex. 121; 24 L. T. 69	150
— v. Onion, 2 C. B. (N. S.) 790; 26 L. J. C. P. 261	235
Homborg, <i>Ex parte</i> , 2 Mont. D. & D. 642	127
Home v. Bentinck, 2 B. & B. 130; 22 R. R. 748	298
Homer v. Ashford, 3 Bing. 322; 28 R. R. 634	48
Hood & Moore's Stores, Ltd. v. Jones, 81 L. T. 169	53, 55
Hooper & Ashby v. Willis, 93 L. T. 236; 94 L. T. 624; 21 T. L. R. 691	51
Hopkins v. M'Bride, 50 W. R. 255; 18 T. L. R. 53	119
— v. Prescott, 4 C. B. 578; 16 L. J. C. P. 259; 72 R. R. 647	21
Hopwood v. Thorn, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87; 79 R. R. 503	285
Horan v. Hayhoe, [1904] 1 K. B. 288; 73 L. J. K. B. 133; 90 L. T. 12; 52 W. R. 231; 68 J. P. 102; 20 T. L. R. 118	32
Horn v. Chandler, 1 Mod. 271	22
Horne v. Ivy, 1 Mod. 18	214
Horner v. Flintoff, 9 M. & W. 678; 11 L. J. Ex. 270; 60 R. R. 866	58
— v. Graves, 7 Bing. 735; 33 R. R. 635	49, 51, 52
Horsfall v. Handley, 8 Taunt. 136	261
Horton v. M'Murtry, 5 H. & N. 667; 29 L. J. Ex. 260; 2 L. T. 297; 8 W. R. 285	73, 81
Hotchin v. Hindmarsh, [1891] 2 Q. B. 181; 60 L. J. M. C. 146; 65 L. T. 149; 39 W. R. 607	268
Hough v. Railway Co., 100 U. S. (10 Otto) 213	145
Houghton v. Pilkington, [1912] 3 K. B. 308; 107 L. T. 235; 28 L. T. R. 492; 56 S. J. 633	187
Hovenden v. Millhof, 83 L. T. 41; 16 T. L. R. 506	65
Howard v. Baillie, 2 H. Bl. 618; 3 R. R. 531	175, 182
— v. Braithwaite, 1 Ves. & B. 209	190
— v. Chapman, 4 C. & P. 508; 34 R. R. 814	185
— v. Crowther, 8 M. & W. 601; 10 L. J. Ex. 355; 58 R. R. 823	101
— v. Sheward, L. R. 2 C. P. 148; 36 L. J. C. P. 42; 15 L. T. 183; 15 W. R. 45	183
— v. Wilson, 4 Hagg. 107	343
— v. Woodward, 34 L. J. Ch. 47; 10 Jur. (N. S.) 1123; 11 L. T. 414; 13 W. R. 132	59, 60
Howell v. Batt, 5 B. & Ad. 504; 3 L. J. K. B. 49	265
Howells v. Landore Siemens Steel Co., L. R. 10 Q. B. 62; 44 L. J. Q. B. 25; 32 L. T. 19; 23 W. R. 335	154
— v. Wynne, 15 C. B. (N. S.) 3; 32 L. J. M. C. 241	198
Hubbersty v. Ward, 8 Ex. 330; 22 L. J. Ex. 113	229
Hubert v. Treherne, 3 M. & G. 743; 11 L. J. C. P. 78; 60 R. R. 600	22
Hudson v. Foot, 10 Ir. C. L. R. 509	267
Huffell v. Armitstead, 7 C. & P. 56; 48 R. R. 756	36
Hughes v. Budd, 8 Dowl. 478; 4 Jur. 654; 59 R. R. 835	21, 25
— v. Chatham Overseers, 5 M. & G. 54; 13 L. J. C. P. 44	32
— v. Humphreys, 6 B. & C. 680	72

	PAGE
Hughes v. Percival, 8 App. Cas. 443; 52 L. J. Q. B. 719; 49 L. T. 189; 31 W. R. 725	243
Hulle v. Heightman, 2 East, 145	133
Hulse v. Hulse, 17 C. B. 711; 25 L. J. C. P. 177; 4 W. R. 239	121
Humble v. Hunter, 12 Q. B. 310; 17 L. J. Q. B. 310; 12 Jur. 1021; 76 R. R. 291	255
Humphrys v. Pratt, 5 Bligh (N. S.) 154	142
Hunlocke v. Blacklowe, 2 Wms. Saund. 156	58
Hunt v. Great Northern Railway Co., [1891] 2 Q. B. 189; 60 L. J. Q. B. 498	296
— v. Maniere, 34 L. J. Ch. 142; 11 L. T. 723; 13 W. R. 363	71
— v. Wimbledon Local Board, 4 C. P. D. 48; 48 L. J. C. P. 207; 40 L. T. 115; 27 W. R. 123	10, 13, 17
Hunter v. Berkeley, Countess of, 7 C. & P. 413	194
Hurley v. Baker, 16 M. & W. 26; 16 L. J. Ex. 273	261
Hurrell v. Ellis, 2 C. B. 295; 15 L. J. C. P. 18; 69 R. R. 487	303
Hurt v. Sheffield Corporation, 85 L. J. K. B. 1684; 32 T. L. R. 393; 14 L. G. R. 614	28
Hussy v. Pacy, 1 Lev. 188	67
Hutcheson v. Smith, 5 Ir. Eq. 117	117
Hutchinson v. York, Newcastle, &c., Railway Co., 5 Ex. 343; 19 L. J. Ex. 296	143, 145
Huttman v. Boulnois, 2 C. & P. 510	34, 64, 133
Hutton v. Ras S.S. Co., Ltd., [1907] 1 K. B. 834; 76 L. J. K. B. 562; 96 L. T. 515; 23 T. L. R. 295; 12 Com. Cas. 231	116
— v. Warren, 1 M. & W. 475; 5 L. J. Ex. 234; 36 R. R. 368	27
— v. West Cork Railway Co., 23 Ch. D. 654; 52 L. J. Ch. 689; 49 L. T. 420; 31 W. R. 827	117
Huzzey v. Field, 2 C. M. & R. 432; 41 R. R. 755	214
Hyde v. Johnson, 2 Bing. N. C. 776; 5 L. J. C. P. 291; 42 R. R. 737	174
— v. Windsor, Dean of, Cro. Eliz. 552	135

I.

ILLIDGE v. Goodwin, 5 C. & P. 190; 38 R. R. 798	226
Illustrated Newspaper Corporation, <i>In re</i> , 16 T. L. R. 157	40
Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599; 61 L. J. Q. B. 449; 66 L. T. 556; 8 T. L. R. 408	8
Imperial Wine Co., <i>In re</i> ; Shirreff's Case, 14 Eq. 417; 42 L. J. Ch. 5; 20 W. R. 966	126
Inchbald v. Western Neigherry Coffee Co., 17 C. B. (N. S.) 733; 34 L. J. C. P. 15; 11 L. T. 345; 13 W. R. 95	121
Indermaur v. Dames, L. R. 1 C. P. 274; L. R. 2 C. P. 311; 36 L. J. C. P. 181; 16 L. T. 293; 15 W. R. 434	172
Ingerson v. Miller, 47 Barb. 47	100, 104
Ireland v. Livingston, L. R. 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79 ..	175
— v. Thomson, 4 C. B. 149; 17 L. J. C. P. 241; 72 R. R. 560	70, 71, 261
Irish, <i>In re</i> , 40 Ch. D. 49; 58 L. J. Ch. 279; 60 L. T. 224; 37 W. R. 231 ...	68
Irwin v. Brandwood, 2 H. & C. 960; 33 L. J. Ex. 257; 9 L. T. 772; 12 W. R. 438	235
— v. Dearman, 11 East, 23; 10 R. R. 423	101
— v. Waterloo Taxi-Cab Co., Ltd., [1912] 3 K. B. 588; 81 L. J. K. B. 998; 107 L. T. 288; 28 T. L. R. 567	222
Iveson v. Conington, 1 B. & C. 160; 25 R. R. 344	257

J.

JACKSON v. Bridge, 12 Mod. 650	130
Jacobs v. Morris, [1902] 1 Ch. 816; 71 L. J. Ch. 363; 86 L. T. 275; 50 W. R. 371	175, 195
Jacoby v. Whitmore, 49 L. T. 335; 32 W. R. 18	57
Jacquot v. Bourra, 7 Dowl. 348	76
James v. Brook, 9 Q. B. 7; 16 L. J. Q. B. 17; 72 R. R. 180	285
Jardine v. Leathley, 32 L. J. Q. B. 132; 7 L. T. 783; 11 W. R. 432	177
Jenkins v. Betham, 15 C. B. 168; 24 L. J. C. P. 94; 3 W. R. 283	83
— v. Hutchinson, 13 Q. B. 744; 18 L. J. Q. B. 274; 13 Jur. 763; 78 R. R. 500 ..	259

	PAGE
Jenner <i>v.</i> Turner, 16 Ch. D. 188; 50 L. J. Ch. 161; 43 L. T. 468; 29 W. R. 99	342
Jenoure <i>v.</i> Delmege, [1891] A. C. 73; 60 L. J. P. C. 11; 63 L. T. 814; 39 W. R. 388	288, 300
Jesse <i>v.</i> Roy, 1 C. M. & R. 316; 3 L. J. Ex. 268; 40 R. R. 580	133
Jewel <i>v.</i> Stead, 6 E. & B. 350; 25 L. J. Q. B. 294; 4 W. R. 544	54
Jewsbury <i>v.</i> Newbold, 26 L. J. Ex. 247	4
Jobson <i>v.</i> Palmer, [1893] 1 Ch. 71; 62 L. J. Ch. 180; 67 L. T. 797; 41 W. R. 264; 9 T. L. R. 106	244
Joel <i>v.</i> Morison, 6 C. & P. 501; 40 R. R. 814	218, 219
John Griffiths Cycle Corporation <i>v.</i> Humber & Co., [1899] 2 Q. B. 414; 68 L. J. Q. B. 959; 81 L. T. 310	22
Johnson <i>v.</i> Blenkinsopp, 5 Jur. 870; 62 R. R. 865	28, 39
— <i>v.</i> Dodgson, 2 M. & W. 653; 6 L. J. Ex. 185; 46 R. R. 733	22
— <i>v.</i> Evans, 3 Esp. 32; 6 R. R. 809	294
— <i>v.</i> Lindsay & Co., [1891] A. C. 371; 61 L. J. Q. B. 90; 65 L. T. 97; 40 W. R. 405; 7 T. L. R. 715	149, 156
— <i>v.</i> Shrewsbury and Birmingham Railway Co., 3 D. M. & G. 914; 22 L. J. Ch. 921	110
Johnston <i>v.</i> Marks, 19 Q. B. D. 509; 57 L. J. Q. B. 6; 35 W. R. 806	5
Johnstone <i>v.</i> Milling, 16 Q. B. D. 460; 55 L. J. Q. B. 162; 54 L. T. 629; 34 W. R. 238	109, 110
Jolly <i>v.</i> Rees, 15 C. B. (N. S.) 628; 33 L. J. C. P. 177; 10 L. T. 298; 12 W. R. 473	4
Jones, <i>In re</i> , Lloyd, <i>Ex parte</i> , [1891] 2 Q. B. 231; 60 L. J. Q. B. 751; 64 L. T. 804; 40 W. R. 95; 7 T. L. R. 601	15
—, <i>In re</i> ; Williams <i>v.</i> Attorney-General, 106 L. T. 941	232
— <i>v.</i> Brown, 1 Peake, 233; 1 Esp. 217. <i>Stated</i> 7 R. R. 656, n.	99
— <i>v.</i> Hart, Lord Raym. 738; 2 Salk. 441	186
— <i>v.</i> Heavens, 4 Ch. D. 636; 25 W. R. 460	56, 60
— <i>v.</i> Henley, 2 Chanc. Rep. 361	345, 346
— <i>v.</i> Jones, [1916] 2 A. C. 481; 85 L. J. K. B. 1519; 115 L. T. 432; 61 S. J. 8; 32 T. L. R. 705	285
— <i>v.</i> Littledale, 6 A. & E. 486; 6 L. J. K. B. 169; 45 R. R. 542	256
— <i>v.</i> Liverpool Corporation, 14 Q. B. D. 890; 54 L. J. Q. B. 345; 33 W. R. 551	236
— <i>v.</i> Merionethshire Permanent Benefit Building Society, [1892] 1 Ch. 173; 61 L. J. Ch. 138; 65 L. T. 685; 40 W. R. 273; 8 T. L. R. 133	340
— <i>v.</i> Mills, 10 C. B. (N. S.) 788; 31 L. J. C. P. 66	36
— <i>v.</i> Phipps, L. R. 3 Q. B. 567; 37 L. J. Q. B. 198; 18 L. T. 813; 16 W. R. 1044	177
— <i>v.</i> Scullard, [1898] 2 Q. B. 565; 67 L. J. Q. B. 895; 79 L. T. 386; 47 W. R. 303; 14 T. L. R. 580	237
— <i>v.</i> Thomas, 53 L. T. 678; 34 W. R. 104; 50 J. P. 149	301
— <i>v.</i> Victoria Graving Dock Co., 2 Q. B. D. 314; 46 L. J. Q. B. 219; 36 L. T. 347; 25 W. R. 501	22
— <i>v.</i> Waite, 5 Bing. N. C. 341; 9 Cl. & F. 101; 50 R. R. 705	21
Jordan <i>v.</i> Norton, 4 M. & W. 155; 7 L. J. Ex. 281; 51 R. R. 508	190, 192
Josephs <i>v.</i> Pebrer, 3 B. & C. 639	20
Josselyn <i>v.</i> Parson, L. R. 7 Ex. 127; 41 L. J. Ex. 60; 25 L. T. 912; 20 W. R. 316	57
Jung <i>v.</i> Phosphate of Lime Co., L. R. 3 C. P. 139; 37 L. J. C. P. 73; 17 L. T. 541; 16 W. R. 309	258
Justitia, The, 12 P. D. 145; 56 L. J. Adm. 111; 57 L. T. 816; 6 Asp. M. C. 198	116

K.

K. <i>v.</i> Raschen, 38 L. T. 38	83
Kaye <i>v.</i> Brett, 5 Ex. 269; 19 L. J. Ex. 346	185
Keane <i>v.</i> Boycott, 2 H. Bl. 511; 3 R. R. 494	89
Keen <i>v.</i> Henry, [1894] 1 Q. B. 292; 63 L. J. Q. B. 211; 69 L. T. 671; 42 W. R. 214; 10 T. L. R. 96	211
Keighley, Maxsted & Co. <i>v.</i> Durant, [1901] A. C. 240; 70 L. J. Q. B. 662; 84 L. T. 777	176
Keir <i>v.</i> Leeman, 9 Q. B. 371; 15 L. J. Q. B. 359; 72 R. R. 298	339
Kelly <i>v.</i> New York (Mayor of), 1 Kernan (11 N. Y. Rep.), 432	239

	PAGE
Kelner v. Baxter, L. R. 2 C. P. 174; 36 L. J. C. P. 94; 15 L. T. 213; 15 W. R. 278	256, 257, 259
Kemble v. Farren, 6 Bing. 141; 7 L. J. (O. S.) C. P. 258; 31 R. R. 366	58, 63
Kemp v. Courage & Co., 7 T. L. R. 50	214
Keon v. Hart, Ir. R. 2 C. L. 138; Ir. R. 3 C. L. 388	37, 41
Kershaw v. Bailey, 1 Ex. 743; 17 L. J. Ex. 129; 74 R. R. 837	297
Kieran v. Sandars, 6 A. & E. 515; 6 L. J. K. B. 145	70
Killick v. Graham, [1896] 2 Q. B. 196; 65 L. J. M. C. 180; 75 L. T. 29; 44 W. R. 669; 12 T. L. R. 428	269
Kine v. Sewell, 3 M. & W. 297; 7 L. J. Ex. 92; 49 R. R. 603	297
King, <i>In re</i> ; Jackson v. Attorney-General, [1917] 2 Ch. 420; 87 L. J. Ch. 3; 117 L. T. 529; 33 T. L. R. 535	344
— v. London Improved Cab Co., 23 Q. B. B. 281; 58 L. J. Q. B. 546; 61 L. T. 34; 37 W. R. 737	211
— v. Spurr, 8 Q. B. D. 104; 51 L. J. Q. B. 105; 45 L. T. 709; 30 W. R. 152	211
— v. Waring, 5 Esp. 13	291
Kingston-upon-Hull (Mayor of) v. Harding, [1892] 2 Q. B. 494; 62 L. J. Q. B. 55; 67 L. T. 539; 41 W. R. 19	106
Kinsella v. Hamilton, 26 L. R. Ir. 671	211, 233
Kirchner & Co. v. Gruban, [1909] 1 Ch. 413; 78 L. J. Ch. 117; 99 L. T. 932	62, 68
Kirkin v. Jenkins, 32 L. J. M. C. 140; 8 L. T. 243; 11 W. R. 618	313
Kirkstall Brewery Co. v. Furness Railway Co., L. R. 9 Q. B. 468; 43 L. J. Q. B. 142; 30 L. T. 783; 22 W. R. 876	186, 223
Knight v. Barber, 16 M. & W. 66; 16 L. J. Ex. 18	24
— v. Crockford, 1 Esp. 190; 5 R. R. 729	22
— v. Fox, 5 Ex. 721; 20 L. J. Ex. 9	239, 240, 248
— v. Gibbs, 1 A. & E. 43; 3 L. J. K. B. 135; 40 R. R. 247	291
— v. Knight, 3 Beav. 148; 9 L. J. Ch. 354; 11 Cl. & F. 513; 52 R. R. 74	348, 350
— v. North Metropolitan Tramway Co., 78 L. T. 227; 14 T. L. R. 286 ..	224
Knowles v. Compigne, Roscoe's Nisi Prius Evidence	104

L.

LACON v. Hooper, 6 T. R. 224	281
Lacy v. Oshaldiston, 8 C. & P. 80	79
Lagerwall v. Wilkinson, Henderson & Clarke, Ltd., 80 L. T. 55	44
Lacock's Case, Latch. 187	198
Lake v. Butler, 5 E. & B. 92; 24 L. J. Q. B. 273; 3 W. R. 458	54
— v. Campbell, 5 L. T. 582	33, 125
— v. King, 1 Wms. S. 131 b.	297
Lamb v. Aftenborough, 1 B. & S. 831; 31 L. J. Q. B. 41; 10 W. R. 211 ..	186
— v. Burnett, 1 Cr. & J. 291; 9 L. J. (O. S.) Ex. 55	72
— v. Evans, [1893] 1 Ch. 218; 62 L. J. Ch. 404; 68 L. T. 131; 41 W. R. 405; 9 T. L. R. 87	68, 96
— v. Palk, 9 C. & P. 629	222
Lamburn v. Cruden, 2 M. & G. 253; 10 L. J. C. P. 121; 58 R. R. 396	112, 119
Lampleigh v. Braithwaite, Hobart, 105; 1 Sm. L. C. 141	69
Lamson Pneumatic Tube Co. v. Phillips, 91 L. T. 363	53
Lane v. Cotton, 12 Mod. 473; 1 Lord Raym. 646	251, 274
Langan v. Great Western Railway Co., 30 L. T. 173	188
Langton v. Carleton, L. R. 9 Ex. 57; 43 L. J. Ex. 54; 29 L. T. 650	41
Latter v. Braddell, 50 L. J. Q. B. 166, 448	72
Laugher v. Pointer, 5 B. & C. 547; 29 R. R. 319	233, 235, 236, 238
Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495; 42 L. J. P. C. 11; 28 L. T. 377; 21 W. R. 204	299, 300
Law v. Redditch Local Board, [1892] 1 Q. B. 127; 61 L. J. Q. B. 172; 66 L. T. 76; 8 T. L. R. 90	59
Lawford v. Billericay Rural District Council, [1903] 1 K. B. 772; 72 L. J. K. B. 554; 88 L. T. 317; 51 W. R. 630; 19 T. L. R. 322	12, 13
Lawler v. Linden, Ir. Rep., 10 C. L. 188	40
Lawless v. Anglo-Egyptian Cotton Co., L. R. 4 Q. B. 262; 38 L. J. Q. B. 129; 17 W. R. 498	293
Lawrence v. Afalo, [1904] A. C. 17; 73 L. J. Ch. 85; 89 L. T. 569; 52 W. R. 369; 20 T. L. R. 42	96
Lawson, <i>In re</i> , Wardley v. Bringloe, [1914] 1 Ch. 682; 83 L. J. Ch. 519; 110 L. T. 573; 30 T. L. R. 335; 58 S. J. 320	39, 342, 344

	PAGE
Lay v. Midland Railway Co., 34 L. T. 30	231
Laythoarp v. Bryant, 2 Bing. N. C. 735; 5 L. J. C. P. 217; 42 R. R. 709	21
Lea v. Whitaker, L. R. 8 C. P. 70; 27 L. T. 676; 21 W. R. 230	59
Leadbitter v. Farrow, 5 M. & S. 345; 17 R. R. 345	256
Learoyd v. Brook, [1891] 1 Q. B. 431; 60 L. J. Q. B. 373; 64 L. T. 458; 39 W. R. 480; 7 T. L. R. 36	85
Leather Cloth Co. v. Lorisont, 9 Eq. 345; 39 L. J. Ch. 86; 21 L. T. 661; 18 W. R. 572	53
Leathley v. Spyer, L. R. 5 C. P. 595; 39 L. J. C. P. 299; 22 L. T. 821	107
Lee v. Bayes, 18 C. B. 599; 25 L. J. C. P. 249	277
— v. Robinson, 25 L. J. C. P. 249; 18 C. B. 599	277
Lees v. Dunkerley Bros., [1911] A. C. 5; 80 L. J. K. B. 135; 103 L. T. 467; 55 S. J. 44	165
— v. Whitcomb, 5 Bing. 34; 30 R. R. 539	18
Leigh v. Hind, 9 B. & C. 774; 33 R. R. 323	53, 54
Le Lievre v. Gould, [1893] 1 Q. B. 491; 62 L. J. Q. B. 353; 68 L. T. 626; 41 W. R. 468	283
Le Maitre v. Davis, 19 Ch. D. 281; 51 L. J. Ch. 173; 46 L. T. 407; 30 W. R. 360	243
Leng (Sir W. C.) & Co. v. Andrews, [1909] 1 Ch. 763; 78 L. J. Ch. 80; 100 L. T. 7; 25 T. L. R. 93	51
Lennard v. Robinson, 5 E. & B. 125; 24 L. J. Q. B. 275	257
Leroux v. Brown, 12 C. B. 801; 22 L. J. C. P. 1; 1 W. R. 22	16, 18
Le Sage v. Coussmaker, 1 Esp. 188	347
Leslie v. Fitzpatrick, 3 Q. B. D. 229; 47 L. J. M. C. 22; 37 L. T. 446	7
Levy v. Lord Herbert, 7 Taunt. 314	113
— v. Rutley, L. R. 6 C. P. 523; 40 L. J. C. P. 244; 24 L. T. 621; 19 W. R. 976	98
Lewis v. Fog, Str. 944	98, 99
— v. Nicholson, 18 Q. B. 503; 21 L. J. Q. B. 311	257, 259
— v. Peacey, 31 L. J. Ex. 496; (S.C. sub. nom. Peachey, 1 H. & C. 518) 72	72
— v. Read, 13 M. & W. 834; 14 L. J. Ex. 295; 67 R. R. 828	211
— v. Taylor, 16 East, 49	267
Lewson v. Kirk, Cro. Jac. 265	67
Ley v. Peter, 3 H. & N. 101; 27 L. J. Ex. 239; 6 W. R. 437	187
Lickbarrow v. Mason, 2 T. R. 63; 1 Sm. L. C. 694; 1 R. R. 425	177
Lightly v. Clouston, 1 Taunt. 112; 9 R. R. 713	90, 92
Lilley v. Elwin, 11 Q. B. 742; 17 L. J. Q. B. 132; 12 Jur. 623; 75 R. R. 623	34, 37, 75, 112, 134
Lilly v. Hays, 5 A. & E. 548; 6 L. J. K. B. 5	265
Limpus v. London General Omnibus Co., 1 H. & C. 526; 32 L. J. Ex. 34; 7 L. T. 641; 11 W. R. 149	218, 221, 228
Lindley v. Lacey, 17 C. B. (N. S.) 578; 34 L. J. C. P. 7; 11 L. T. 273; 13 W. R. 80	25
Lindsay v. Queen's Hotel Co., Ltd., [1919] 1 K. B. 212; 88 L. J. K. B. 535; 120 L. T. 280; 35 T. L. R. 101	38
Lindus v. Bradwell, 5 C. B. 583; 17 L. J. C. P. 121; 12 Jur. 230; 75 R. R. 798	174
— v. Melrose, 3 H. & N. 177; 27 L. J. Ex. 326	258
Lipson v. Harrison, 22 L. T. 83; 2 W. R. 10	117
Lister v. Stubbs, 45 Ch. D. 1; 59 L. J. Ch. 570; 63 L. T. 75; 38 W. R. 548	66
Liverpool Corporation v. Wright, Johns. 359; 28 L. J. Ch. 868; 7 W. R. 728	21
Llewellyn v. Winckworth, 13 M. & W. 598; 14 L. J. Ex. 329; 67 R. R. 751	181
Lloyd v. Blackburn, 9 M. & W. 363; 11 L. J. Ex. 210	130
— v. Grace, Smith & Co., [1912] A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 28 T. L. R. 547	215, 216
Lloyds v. Harper, 16 Ch. D. 290; 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452	107
Loates v. Maple, 88 L. T. 288	85
Lobb v. Stanley, 5 Q. B. 574; 13 L. J. Q. B. 117	22
Loffus v. Maw, 32 L. J. Ch. 49; 6 L. T. 346; 10 W. R. 513	125
Lomax v. Arding, 10 Ex. 734	73, 81
London Assurance Co. v. Bold, 6 Q. B. 514; 14 L. J. Q. B. 50; 66 R. R. 477	407
London and Colonial Bank, <i>In re</i> , Clark, <i>Ex parte</i> , L. R. 7 Eq. 550; 38 L. J. Ch. 562; 20 L. T. 774	114, 128
London Dock Co. v. Sinnott, 8 E. & B. 347; 27 L. J. Q. B. 129; 6 W. R. 165	13
London and Lancashire Life Assurance Co. v. Fleming, [1897] A. C. 499; 66 L. J. P. C. 116	195

London Tramways Co. v. Bailey, 3 Q. B. D. 217; 47 L. J. M. C. 3; 37 L. T. 499; 26 W. R. 494	119
London and Yorkshire Bank v. Pritt, 56 L. J. Ch. 987; 57 L. T. 875; 36 W. R. 135; 3 T. L. R. 728	60
Long v. Millar, 4 C. P. D. 450; 48 L. J. C. P. 596; 41 L. T. 306; 27 W. R. 720	18
Longmeid v. Holliday, 6 Ex. 761; 20 L. J. Ex. 430	274
Lord North's Case, Dyer, 161	252
Louis v. Smellie, 73 L. T. 226; 11 T. L. R. 515	68
Lound v. Grimwade, 39 Ch. D. 605; 57 L. J. Ch. 725; 59 L. T. 168	21
Louth v. Drummond, Times Newspaper, March 28, 1849	39
Lovegrove v. London, Brighton & S. C. Railway Co., 16 C. B. (N. S.) 669; 33 L. J. C. P. 330; 10 L. T. 718; 12 W. R. 988	153
Lovell v. Howell, 1 C. P. D. 161; 45 L. J. C. P. 387; 34 L. T. 183; 24 W. R. 672	153
Lowe v. Great Northern Railway Co., 62 L. J. Q. B. 524	224
— v. Walter, 8 T. L. R. 358	40
Lowell v. Boston and Lowell Railroad Corporation, 23 Pick. 24	142, 238
Lowndes v. Stamford (Earl of), 18 Q. B. 425; 21 L. J. Q. B. 371	131
Lucas v. Beach, 1 M. & G. 417; 4 Jur. 631; 56 R. R. 419	24, 124
— v. Beale, 10 C. B. 739; 20 L. J. C. P. 134	258
— v. Dixon, 22 Q. B. D. 357; 58 L. J. Q. B. 161; 37 W. R. 370	17
— v. Mason, L. R. 10 Ex. 251; 44 L. J. Ex. 145; 33 L. T. 13; 23 W. R. 924	248, 250
Ludbrook v. Barrett, 46 L. J. C. P. 798; 36 L. T. 616; 25 W. R. 649	122
Ludlow (Mayor of) v. Charlton, 6 M. & W. 815; 10 L. J. Ex. 75; 55 R. R. 794	8, 12
Lumby v. Allday, 1 Cr. & J. 301; 9 L. J. (O. S.) Ex. 62; 35 R. R. 715	285
Lumley v. Gye, 2 E. & B. 216; 22 L. J. Q. B. 463; 1 W. R. 432 ... 86, 87, 88, 168	
— v. Wagner, 5 D. G. & S. 485; 1 D. M. & G. 604; 21 L. J. Ch. 898	61, 63
Lygo v. Newbold, 9 Ex. 302; 23 L. J. Ex. 103	231
Lynch v. Knight, 9 H. L. C. 577; 5 L. T. 291	284
— v. Nurdin, 1 Q. B. 29; 10 L. J. Q. B. 73; 55 R. R. 191	226, 231
Lyons v. Martin, 8 A. & E. 512; 7 L. J. Q. B. 214; 47 R. R. 637	228, 250

M.

MAOBEATH v. Haldimand, 1 T. R. 172; 1 R. R. 177	254
McCarthy v. British Shipowners Co., 10 L. R. Ir. 384	153, 157
— v. Colvin, 9 A. & E. 607; 8 L. J. Q. B. 158; 48 R. R. 606	262
M'Daniel's Case, Fost. 125	198
Macdonald v. Longbottom, 28 L. J. Q. B. 293; 29 L. J. Q. B. 256; 1 E. & E. 987; 2 L. T. 606; 8 W. R. 614	26
McDowall v. Great Western Railway Co., [1903] 2 K. B. 331; 72 L. J. K. B. 652; 88 L. T. 825; 19 T. L. R. 552	226
MacDowall's Case, 32 Ch. D. 366; 55 L. J. Ch. 620; 54 L. T. 667; 34 W. R. 529	41
M'Elveney v. Connellan, 17 Ir. C. L. R. 55	295
M'Gregor v. Lowe, Ry. & M. 57; 1 C. & P. 200	262
McGregor v. McGregor, 21 Q. B. D. 424; 57 L. J. Q. B. 591; 37 W. R. 45 ...	17
Machu v. South Western Railway Co., 2 Ex. 415; 17 L. J. Ex. 271; 12 Jur. 501; 76 R. R. 645	212
M'Intyre v. Belcher, 14 C. B. (N. S.) 654; 32 L. J. C. P. 255; 8 L. T. 461; 11 W. R. 889	47
Mackay v. Ford, 5 H. & N. 792; 29 L. J. Ex. 404; 2 L. T. 514; 8 W. R. 586	74
M'Kean v. Cowley, 7 L. T. 828	114
McKenzie v. M'Leod, 10 Bing. 385; 3 L. J. C. P. 79; 38 R. R. 477	210, 227
M'Keon v. Bolton, 1 Ir. C. L. R. 377	238
M'Kinney v. Irish North Western Railway Co., Ir. 2 C. L. 600	156
M'Laughlin v. Pryor, 4 M. & G. 48; 11 L. J. C. P. 169; 4 Scott, N. R. 908; 61 R. R. 455	235, 236, 249
Maclean v. Dunn, 4 Bing. 722; 29 R. R. 714	22
McManus v. Cooke, 35 Ch. D. 681; 56 L. J. Ch. 662; 56 L. T. 900; 35 W. R. 754	17
M'Manus v. Crickett, 1 East, 106; 5 R. R. 518	229
M'Millan v. M'Millan, 23 Ct. Sess. Cas. (Sec. Ser.) 1082	154

	PAGE
M'Naughton v. Caledonian Railway Co., 19 Ct. Sess. Cas. (Sec. Ser.) 271; 21 Ct. Sess. Cas. (Sec. Ser.) 160	152
M'Queen v. Great Western Railway Co., L. R. 10 Q. B. 569; 44 L. J. Q. B. 130; 32 L. T. 759; 23 W. R. 698	212
Maddick v. Marshall, 16 C. B. (N. S.) 387; 17 C. B. (N. S.) 829; 11 L. T. 611; 13 W. R. 205	180
Maddison v. Alderson, 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820	16, 125, 342
Maddon v. White, 2 T. R. 159; 1 R. R. 453	5
Madras, The, [1898] P. 90; 67 L. J. P. 53; 78 L. T. 325	132
Magee v. Atkinson, 2 M. & W. 440; 6 L. J. Ex. 115; 46 R. R. 635	256
— v. Lavell, L. R. 9 C. P. 107; 43 L. J. C. P. 131; 30 L. T. 169; 22 W. R. 334	59
Mahony v. Kekule, 14 C. B. 390; 23 L. J. C. P. 54; 2 W. R. 155	258
Mainwaring v. Leslie, 2 C. & P. 507; M. & M. 18; 31 R. R. 691	4
Makepeace v. Jackson, 4 Taunt. 770; 14 R. R. 664	93
Mallan v. May, 11 M. & W. 653; 12 L. J. Ex. 376; 63 R. R. 708; 13 M. & W. 511; 14 L. J. Ex. 48; 67 R. R. 707	48, 51
Malling Union (Guardians) v. Graham, L. R. 5 C. P. 201; 39 L. J. C. P. 54; 22 L. T. 789; 18 W. R. 674	105
Manby v. Long, 3 Lev. 107	11
— v. Scott, 2 Sm. L. C. 446	3, 4
— v. Witt, 18 C. B. 544; 25 L. J. C. P. 294; 4 W. R. 613	296
Mangan v. Atterton, L. R. L. R. 1 Ex. 239; 4 H. & C. 388; 35 L. J. Ex. 161; 14 L. T. 411; 14 W. R. 771	232
Manley v. Field, 7 C. B. (N. S.) 96; 29 L. J. C. P. 79	102
Mann v. Barrett, 6 Esp. 32; 9 R. R. 805	103
Mansfield v. Baddeley, 34 L. T. 696	143
Manubens v. Leon, [1919] 1 K. B. 208; 88 L. J. K. B. 311; 120 L. T. 279; 35 T. L. R. 94	114
Manvell v. Thomson, 2 C. & P. 303; 31 R. R. 666	101, 102
Manzoni v. Douglas, 6 Q. B. D. 145; 50 L. J. Q. B. 289; 29 W. R. 425	213
Marchant v. Lee Conservancy Board, L. R. 9 Ex. 60; 43 L. J. Ex. 44; 30 L. T. Rep. 367	11
Marcus, Re, 56 L. J. Ch. 830; 57 L. T. 399; 3 T. L. R. 816	345, 346
Marney v. Scott, [1899] 1 Q. B. 986; 68 L. J. Q. B. 736; 47 W. R. 666; 15 T. L. R. 320	173
Marsh v. Estcourt, 24 Q. B. D. 147; 59 L. J. Q. B. 100; 38 W. R. 495	32
— v. Joseph, [1897] 1 Ch. 213; 66 L. J. Ch. 128; 75 L. T. 558; 45 W. R. 209	176, 251
— v. Keating, 1 Bing. N. C. 198; 2 Cl. & F. 250; 37 R. R. 75	99, 339
Marshall v. Broadhurst, 1 Tyrw. 348; 1 Cr. & J. 403	136
— v. Lynn, 6 M. & W. 109; 9 L. J. Ex. 126; 55 R. R. 534	27
— v. Parsons, 9 C. & P. 656	118
— v. Powell, 9 Q. B. 779; 16 L. J. Q. B. 5	24
— v. York, Newcastle, and Berwick Railway Co., 11 C. B. 655; 21 L. J. C. P. 34	274
Martin v. Strong, 5 A. & A. 535; 6 L. J. K. B. 48; 44 R. R. 487	297
— v. Temperley, 4 Q. B. 298; 12 L. J. Q. B. 129; 7 Jur. 150; 62 R. R. 377	238, 247
— v. West Derby Assessment Committee, 11 Q. B. D. 145; 52 L. J. M. C. 66; 31 W. R. 489; 47 J. P. 500	32
Martinez v. Gerber, 3 M. & G. 88; 10 L. J. C. P. 314; 5 Jur. 463; 60 R. R. 466	98, 99
Mary, The, 5 P. D. 14; 48 L. J. P. D. A. 66; 41 L. T. 351; 28 W. R. 925	239
Mason v. Provident Clothing and Supply Co., Ltd., [1913] A. C. 724; 82 L. J. K. B. 1153; 109 L. T. 449; 29 T. L. R. 727	57
Masters v. Lowther, 11 C. B. 948; 21 L. J. C. P. 130	269
Mathews v. Mathews, 2 Ves. sen. 635	347
Maund v. Monmouthshire Canal Co., 4 M. & G. 452; 11 L. J. C. P. 317	213
Maunder v. Conyers, 2 Stark. 281	194
— v. Venn, M. & M. 323; 31 R. R. 734	102
Maw v. Jones, 25 Q. B. D. 107; 59 L. J. Q. B. 542; 63 L. T. 347; 38 W. R. 718	115
Maxim-Nordenfelt Guns, &c., Co. v. Nordenfelt, [1893] 1 Ch. 630; 62 L. J. Ch. 273, 749; 68 L. T. 833; [1894] A. C. 535; 63 L. J. Ch. 908; 71 L. T. 489; 42 W. R. 238; 10 T. L. R. 636	51

	PAGE
May v. O'Neill, 44 L. J. Ch. 660	59
Mayhew v. Suttle, 4 E. & B. 347; 24 L. J. Q. B. 54; 3 W. R. 108	33, 34
Meakin v. Morris, 12 Q. B. D. 352; 53 L. J. M. C. 72; 32 W. R. 661	6
Medawar v. Grand Hotel Co., [1891] 2 Q. B. 11; 60 L. J. Q. B. 209; 64 L. T. 851; 55 J. P. 614; 7 T. L. R. 269	244
Mee v. Cruikshank, 86 L. T. 708; 66 J. P. 89; 18 T. L. R. 271	209
Meek v. Port of London Authority, [1918] 1 Ch. 415; (C. A., [1918] 2 Ch. 96); 87 L. J. Ch. 376; 119 L. T. 196; 62 J. P. 225; 16 L. G. R. 483; 34 T. L. R. 420	27
— v. Wendt, 21 Q. B. D. 126; 59 L. T. 558	259
Mellors v. Shaw, 1 B. & S. 437; 30 L. J. Q. B. 333; 9 W. R. 748	155
Membery v. Great Western Railway Co., 14 App. Cas. 179; 58 L. J. Q. B. 563; 61 L. T. 566; 38 W. R. 145	161
Mercer v. Irving, E. B. & E. 563; 27 L. J. Q. B. 291; 6 W. R. 661	58
— v. Whall, 5 Q. B. 447; 14 L. J. Q. B. 267; 9 Jur. 576; 64 R. R. 544	79, 108
Merchants of the Staple of England v. Bank of England, 21 Q. B. D. 160; 57 L. J. Q. B. 418; 36 W. R. 880; 52 J. P. 580	216
Merryweather v. Moore, [1892] 2 Ch. 518; 61 L. J. Ch. 505; 66 L. T. 719; 40 W. R. 540; 8 T. L. R. 539	69
— v. Nixan, 8 T. R. 186; 1 Sm. L. C. (12th ed.) 443; 16 R. R. 810	141, 276
Mersey Docks and Harbour Board v. Gibbs, L. R. 1 H. L. 93; 35 L. J. Ex. 225; 14 L. T. 677; 14 W. R. 872	252, 253
Messiter v. Rose, 13 C. B. 162; 22 L. J. C. P. 78	64
Metcalfe, <i>Ex parte</i> , 6 E. & B. 287; 4 W. R. 490	120
— v. London, Brighton and S. C. Railway Co., 4 C. B. (N. S.) 307; 27 L. J. C. P. 205, 333; 6 W. R. 498	212
Metropolitan Electric Supply Co. v. Ginder, [1901] 2 Ch. 799; 70 L. J. Ch. 862; 84 L. T. 818; 49 W. R. 508	61
Metzner v. Bolton, 9 Ex. 518; 23 L. J. Ex. 130; 2 W. R. 302	27, 38, 40
Meux v. Great Eastern Railway Co., [1895] 2 Q. B. 387; 64 L. J. Q. B. 657; 73 L. T. 247; 43 W. R. 680; 11 T. L. R. 517	99
Michael v. Alestree, 2 Lev. 172; 1 Ventris, 295	210, 275
Michigan Railway Co. v. Austin, 40 Mich. Rep. 247	143
Midland Counties District Bank, Ltd. v. Attwood, [1905] 1 Ch. 357; 74 L. J. Ch. 286; 92 L. T. 360; 21 T. L. R. 175	126
Midland Counties Insurance Co. v. Smith, 6 Q. B. D. 561; 50 L. J. Q. B. 329; 45 L. T. 411; 29 W. R. 850	99
Mill v. Hawker, L. R. 10 Ex. 92; 44 L. J. Ex. 49; 33 L. T. 177; 23 W. R. 348	274
Miller v. Aris, 3 Esp. 230	262
— v. David, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 30 L. T. 58; 22 W. R. 332	285
— v. Hamilton, 5 C. & P. 433	178
— v. Hancock, [1893] 2 Q. B. 177; 69 L. T. 214; 41 W. R. 578; 9 T. L. R. 512	172
— v. Seare, 2 W. Bl. 1141	280
Millett v. Coleman, 44 L. J. Q. B. 194; 33 L. T. 204	124
Milligan v. Wedge, 12 A. & E. 737; 10 L. J. Q. B. 19; 4 P. & D. 714; 54 R. R. 677	34, 238, 247, 319
Mills v. Armstrong, 13 App. Cas. 1; 57 L. J. P. D. & A. 65; 58 L. T. 423; 36 W. R. 870	231
— v. Dunham, [1891] 1 Ch. 576; 60 L. J. Ch. 362; 64 L. T. 712; 39 W. R. 289; 7 T. L. R. 238	51, 55
Milner v. Field, 5 Ex. 829; 20 L. J. Ex. 68	122
— v. Great Northern Railway Co., 50 L. T. 367	217
Mires v. Solebay, 2 Mod. 242	277, 278
Mitchel v. Reynolds, 1 P. Wms. 181	49
Mitchell v. Brown, 1 E. & E. 267	205
— v. Crassweller, 13 C. B. 237; 22 L. J. C. P. 100	219, 220
Mitcheson v. Oliver, 5 E. & B. 419; 25 L. J. Q. B. 39	181
Mizen v. Pick, 3 M. & W. 481; 7 L. J. Ex. 153; 49 R. R. 694	4
Möenich v. Fenestre, 61 L. J. Ch. 737; 67 L. T. 602; 8 T. L. R. 804	55
Moffat v. Parsons, 5 Taunt. 307; 15 R. R. 506	181
Moffatt v. Dickson, 13 C. B. 543; 22 L. J. C. P. 265	120
— v. Laurie, 15 C. B. 583; 24 L. J. C. P. 56; 3 W. R. 252	120, 121
Mogul Steamship Co. v. Macgregor, [1892] A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 8 T. L. R. 182	168, 170

	PAGE
Molton v. Camroux, 4 Ex. 17; 18 L. J. Ex. 356; 80 R. R. 461	8
Monaghan v. W. H. Rhodes & Son, [1920] 1 K. B. 487; 89 L. J. K. B. 379; 122 L. T. 537	160
Monk v. Clayton, 10 Mod. 110	197
Monkman v. Shepherdson, 11 A. & E. 411; 9 L. J. Q. B. 134; 3 P. & D. 182; 52 R. R. 390	117
Monks v. Dillon, 12 L. R. Ir. 321	274
Montague v. Flockton, 16 Eq. 189; 42 L. J. Ch. 677; 28 L. T. 580; 21 W. R. 668	61
Montaignac v. Shitta, 15 App. Cas. 357	195
Montefiore v. Lloyd, 15 C. B. (N. S.) 203; 33 L. J. C. P. 49; 9 L. T. 330; 12 W. R. 83	107
Moon v. Camberwell Corporation, 89 L. T. 595; 20 T. L. R. 43	46
— v. Towers, 8 C. B. (N. S.) 611	251
Moorcock, The, 14 P. D. 64; 58 L. J. P. 73; 60 L. T. 654; 37 W. R. 439 ...	42
Moore v. Bushell, 27 L. J. Ex. 3	265
— v. Metropolitan Railway Co., L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; 27 L. T. 579; 21 W. R. 145	223
Morel v. Earl of Westmoreland, [1903] 1 K. B. 64; [1904] A. C. 11; 72 L. J. K. B. 66; 73 L. J. K. B. 93; 87 L. T. 635; 89 L. T. 702; 51 W. R. 290; 52 W. R. 353; 19 T. L. R. 43	4
Moreton v. Hardern, 4 B. & C. 223	155
Morgan v. Birnie, 9 Bing. 673; 35 R. R. 653	122
— v. Vale of Neath Railway Co., L. R. 1 Q. B. 149; 35 L. J. Q. B. 23; 13 L. T. 564; 14 W. R. 144	153
Morison v. Moat, 9 Hare, 241	68
— v. Thompson, L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; 30 L. T. 869; 22 W. R. 859	65, 92
Morison & Co., <i>In re</i> , 106 L. T. 731	127
Morrison v. General Steam Navigation Co., 8 Ex. 733; 22 L. J. Ex. 223	230
Mouffet v. Cole, L. R. 8 Ex. 32; 42 L. J. Ex. 8; 28 L. T. 678; 21 W. R. 175	54
Moult v. Halliday, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451; 77 L. T. 794; 46 W. R. 318; 62 J. P. 8; 14 T. L. R. 109	38
Mounsey v. Stephenson, 7 C. & B. 403; 6 L. J. (O. S.) K. B. 119	25
Mowbray v. Merryweather, [1895] 2 Q. B. 640; 65 L. J. Q. B. 50; 73 L. T. 459; 44 W. R. 49; 11 T. L. R. 14	173
Moxham, The, 1 P. D. 107; 47 L. J. P. D. A. 17; 34 L. T. 559; 24 W. R. 597	239
Mullins v. Collins, L. R. 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838; 22 W. R. 297	202
Mulvehall v. Millward, 1 Kernan's Rep. 343	101
Mumford v. Gething, 7 C. B. (N. S.) 305; 29 L. J. C. P. 105; 1 L. T. 64; 8 W. R. 187	25, 53
Munro v. Butt, 8 E. & B. 738	122
Murphy v. Boese, L. R. 10 Ex. 126; 44 L. J. Ex. 40; 32 L. T. 122; 23 W. R. 474	22
— v. Kellett, 13 Ir. C. L. R. 488	295
— v. Phillips, 35 L. T. 477; 24 W. R. 647	159
— v. Smith, 19 C. B. (N. S.) 361; 12 L. T. 605	153
Murray v. Currie, L. R. 6 C. P. 24; 40 L. J. C. P. 26; 23 L. T. 557; 19 W. R. 104	234, 237
— v. Mann, 2 Ex. 538; 17 L. J. Ex. 256; 76 R. R. 686	71, 265
— v. Moutrie, 6 C. & P. 471	72
Mutual Reserve Fund Life Association v. New York Life Insurance Co., 75 L. T. 528; 13 T. L. R. 32	62
Myers v. Sarl, 3 E. & E. 306; 30 L. J. Q. B. 9; 9 W. R. 96	29
Myler v. Fitzpatrick, 6 Madd. 360; 23 R. R. 247	71

N.

NATAL Land Co. v. Pauline Colliery Syndicate, [1904] A. C. 120; 73 L. J. P. C. 22; 89 L. T. 678	176
National Bolivian Navigation Co. v. Wilson, 5 App. Cas. 176; 43 L. T. 70 ...	189
National Provincial Bank of England v. Marshall, 40 Ch. D. 112; 58 L. J. Ch. 229; 60 L. T. 341; 37 W. R. 183	60
Neal, <i>Ex parte</i> , Mont. & M. 194	127
Neale v. Turton, 4 Bing. 149; 29 R. R. 531	192, 195

Neate v. Harding, 6 Ex. 349; 20 L. J. Ex. 250	263
Nevill v. Fine Arts and General Insurance Co., [1895] 2 Q. B. 156; [1897] A. C. 68; 64 L. J. Q. B. 681; 66 L. J. Q. B. 195; 72 L. T. 525; 75 L. T. 606; 13 T. L. R. 97	300
Newall v. Tomlinson, L. R. 6 C. P. 405; 25 L. T. 382	262
Newby v. Wiltshire, 2 Esp. 739; 4 Doug. 284; 5 R. R. 772	139
Newlands v. National Employers' Accident Association, 54 L. J. Q. B. 428; 53 L. T. 242	195
Newling v. Dobell, 38 L. J. Ch. 111; 19 L. T. 408	56
Newman, <i>In re</i> , 4 Ch. D. 724; 46 L. J., Bank. 57; 35 L. T. 718; 25 W. R. 244	59
— v. Jones, 17 Q. B. D. 132; 55 L. J. M. C. 113; 55 L. T. 327	203
— v. Walters, 3 Bos. & P. 616; 7 R. R. 886	119
Newman (R. S.), Ltd., <i>In re</i> , Raphael's Claim, [1916] 2 Ch. 309; 115 L. T. 134	128
Newspaper Proprietary Syndicate, Ltd., [1900] 2 Ch. 349; 69 L. J. Ch. 578; 83 L. T. 341; 8 Mans. 65	127
Newton v. Belcher, 12 Q. B. 921; 18 L. J. Q. B. 53	177
— v. Liddiard, 12 Q. B. 925; 18 L. J. Q. B. 53	177
Nichol v. Martyn, 2 Esp. 732; 5 R. R. 770	89
Nicholls v. Stretton, 10 Q. B. 346; 11 Jur. 1009; 74 R. R. 320	21
— v. —, 10 Q. B. 346; 7 Beav. 42; 64 R. R. 10; 11 Jur. 1009	51, 58, 59
Nicholson v. Bradfield Union, L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; 14 L. T. 830; 14 W. R. 731	13
— v. Gooch, 5 E. & B. 999; 25 L. J. Q. B. 137; 4 W. R. 285	262
— v. Mouncey, 15 East, 384; 13 R. R. 501	252
Nickolson v. Knowles, 5 Madd. 47; 21 R. R. 276	71
Nickson v. Brohan, 10 Mod. 109	67, 178, 188, 190, 197
Nicoll v. Greaves, 17 C. B. (N. S.) 27; 33 L. J. C. P. 259; 10 L. T. 531; 12 W. R. 961	39
Noden v. Johnson, 16 Q. B. 218; 20 L. J. Q. B. 95	72
Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A. C. 535; 63 L. J. Ch. 908; 71 L. T. 489; 42 W. R. 238; 10 T. L. R. 636	49, 52
Norfolk, Duke of, v. Worthy, 1 Camp. 337; 10 R. R. 739	260
Norris v. Birch, [1895] 1 Q. B. 639; 64 L. J. M. C. 91; 72 L. T. 491; 43 W. R. 271; 11 T. L. R. 172	303
North American Land and Timber Co. v. Watkins, [1904] 2 Ch. 233; 73 L. J. Ch. 626; 91 L. T. 425; 20 T. L. R. 642	70
North River Bank v. Aymar, 3 Hill Rep. 262	192
North Western Railway Co. v. Whinray, 10 Ex. 77; 23 L. J. Ex. 261; 2 W. R. 523	106
Northern Pacific Railroad Co. v. Petersen, 162 U. S. 346	154
Northey v. Trevillion, 18 T. L. R. 648	43
Norton v. Herron, 1 C. & P. 648; Ry. & M. 229; 28 R. R. 797	256
— v. Powell, 4 M. & G. 42; 11 L. J. C. P. 202	21
Nottage v. Jackson, 11 Q. B. D. 627; 52 L. J. Q. B. 760; 49 L. T. 339; 32 W. R. 106	94
Nowlan v. Ablett, 2 Cr. M. & R. 54; 4 L. J. Ex. 155	39

O.

OAKES v. Mase, 165 U. S. 363	154
Oates v. Hudson, 6 Ex. 346; 20 L. J. Ex. 284	263
O'Byrne v. Burn, 16 Ct. Sess. Cas. (Sec. Ser.) 1025	154, 155
Ogden v. Fossick, 4 D. F. & J. 426; 32 L. J. Ch. 73; 7 L. T. 515; 11 W. R. 128	61, 111
Ogdens, Ltd. v. Nelson, [1904] 2 K. B. 410; [1905] A. C. 109; 73 L. J. K. B. 865; 74 L. J. K. B. 433; 90 L. T. 656; 92 L. T. 478; 53 W. R. 497; 21 T. L. R. 359	43
Ogle v. Atkinson, 5 Taunt. 759; 15 R. R. 647	71
Olding v. Smith, 16 Jur. 497	187, 205
O'Neil v. Armstrong & Co., [1895] 2 Q. B. 418; 65 L. J. Q. B. 7; 73 L. T. 178; 11 T. L. R. 548	133
Oriental Bank, <i>In re</i> , McDowall's Case, 32 Ch. D. 366; 55 L. J. Ch. 620; 54 L. T. 667; 34 W. R. 529	126
Oriental Steamship Co. v. Tylor, [1893] 2 Q. B. 518; 63 L. J. Q. B. 128; 69 L. T. 577; 42 W. R. 89	42

	PAGE
Ormiston v. Great Western Railway Co., [1917] 1 K. B. 598; 86 L. J. K. B. 759; 116 L. T. 479; 33 T. L. R. 171	224
Osborn v. Gillett, L. R. 8 Ex. 88; 42 L. J. Ex. 53; 28 L. T. 197; 21 W. R. 409; 16 T. L. R. 333	99
Osborne v. London and North Western Railway Co., 21 Q. B. D. 220; 57 L. J. Q. B. 618; 59 L. T. 227; 36 W. R. 809	161
— v. Morgan, 130 Mass. Rep. 102; 39 Amer. Rep. 437	164
Overton v. Freeman, 11 C. B. 867; 21 L. J. C. P. 52	239, 248
Owen v. Bowen, 4 C. & P. 93	122
— v. Cronk, [1895] 1 Q. B. 265; 64 L. J. Q. B. 288; 11 T. L. R. 76 ...	261, 264
— v. Gooch, 2 Esp. 567	254
Owens v. Roberts, 6 Ir. C. L. R. 386	288
Ozard v. Darnford, Selw. N. P. 294	4
P.	
PADLEY v. Lincoln Waterworks Co., 2 Mac. & G. 68; 2 H. & Tw. 295; 19 L. J. Ch. 436; 14 Jur. 299	122
Padmore v. Lawrence, 11 A. & E. 380; 9 L. J. Q. B. 137; 4 Jur. 458; 52 R. R. 374	301
Padwick v. King, 7 C. B. (N. S.) 88; 29 L. J. M. C. 42; 1 L. T. 98	267
Pagani v. Gandolfi, 2 C. & P. 370; 31 R. R. 671	112
Page v. Defries, 7 B. & S. 137	222
Paice v. Walker, L. R. 5 Ex. 173; 39 L. J. Ex. 109; 22 L. T. 547; 18 W. R. 789	257
Paine v. Strand Union, 8 Q. B. 326; 15 L. J. M. C. 89; 70 R. R. 503	12
Palethorp v. Furnish, 2 Esp. 511, note	174
Palmer v. Evans, 1 C. B. (N. S.) 151	181
— v. Mallet, 36 Ch. D. 411; 57 L. J. Ch. 226; 58 L. T. 64; 36 W. R. 460	55, 57
— v. Snow, [1900] 1 Q. B. 725; 69 L. J. Q. B. 356; 82 L. T. 199; 48 W. R. 351; 16 T. L. R. 168	273
— v. Wick, &c., Steam Shipping Co., [1894] A. C. 318; 71 L. T. 163; 10 T. L. R. 511	141
Panama Telegraph Co. v. India Rubber Telegraph Works Co., L. R. 10 Ch. 515; 45 L. J. Ch. 121; 32 L. T. 517; 23 W. R. 583	66, 67
Papé v. Westacott, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222; 70 L. T. 18; 42 W. R. 131; 10 T. L. R. 51	185, 259
Pardington v. South Wales Railway Co., 1 H. & N. 392; 26 L. J. Ex. 105 ...	229
Pardoe v. Price, 16 M. & W. 451; 16 L. J. Ex. 192; 73 R. R. 568	11
Parker v. Alder, [1899] 1 Q. B. 20; 68 L. J. Q. B. 7; 79 L. T. 381; 47 W. R. 142; 15 T. L. R. 3	204
— v. Bristol and Exeter Railway Co., 6 Ex. 702	263
— v. Ibbetson, 4 C. B. (N. S.) 346; 27 L. J. C. P. 236; 6 W. R. 519 ...	28, 40, 125
— v. Marchant, 6 Jur. 292; 7 Jur. 457; 1 Y. & C., C. C. 191; 2 Y. & C., C. C. 279; 12 L. J. Ch. 314	345, 346
— v. Winlow, 7 E. & B. 942; 27 L. J. Q. B. 49	257
Parkes v. Prescott, L. R. 4 Ex. 169; 38 L. J. Ex. 105; 20 L. T. 537; 17 W. R. 773	211
Parkin v. South Hetton Coal Co., 98 L. T. 162	135
Parry v. Liverpool Malt Co., [1900] 1 Q. B. 339; 69 L. J. Q. B. 161; 81 L. T. 621	115
— v. Smith, 4 C. P. D. 325; 48 L. J. C. P. 731; 41 L. T. 93; 27 W. R. 801	238
Pasmore v. Oswaldtwistle District Council, [1898] A. C. 387; 67 L. J. Q. B. 635; 73 L. T. 569; 14 T. L. R. 368	162
Patent Floor Cloth Co., <i>In re</i> , Dean and Gilbert's Claim, 41 L. J. Ch. 476; 26 L. T. 467	129
Paterson v. Wallace, 1 Macq. 748	157
Patten v. Rea, 2 C. B. (N. S.) 606; 26 L. J. C. P. 235	222
Pattison v. Jones, 8 B. & C. 578; 3 C. & P. 387; 32 R. R. 490	288, 300
Pattle v. Hornibrook, [1897] 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475; 45 W. R. 123	25
Pauling v. London and North Western Railway Co., 8 Ex. 867; 23 L. J. Ex. 105	177, 179
Paxton v. Popham, 9 East, 408; 36 R. R. 661, 663	20
Payne v. Brecon (Mayor of), 3 H. & N. 572; 27 L. J. Ex. 495; 6 W. R. 801	14
— v. New South Wales Coal Co., 10 Ex. 283; 24 L. J. Ex. 117	19

Peachy v. Rowland, 13 C. B. 182; 22 L. J. C. P. 81	198, 229
Peacock v. Peacock, 2 Camp. 45	121
Pearce v. Foster, 17 Q. B. D. 536; 55 L. J. Q. B. 306; 54 L. T. 664; 34 W. R. 602	78
— v. Gardner, [1897] 1 Q. B. 688; 66 L. J. Q. B. 457; 76 L. T. 441; 45 W. R. 518; 13 T. L. R. 349	18
— v. Lansdowne, 62 L. J. Q. B. 441; 69 L. T. 316; 57 J. P. 760	39
— v. Rogers, 3 Esp. 214	176, 193
Pearse v. Green, 1 Jac. & W. 135; 20 R. R. 258	70
Pearson v. Cox, 2 C. P. D. 369; 36 L. T. 495	237
Peek v. North Staffordshire Railway Co., 10 H. L. C. 473; 32 L. J. Q. B. 241; 8 L. T. 768; 11 W. R. 1023	212
Pelton Brothers v. Harrison (No. 2), [1892] 1 Q. B. 118; 61 L. J. Q. B. 144; 65 L. T. 845; 7 T. L. R. 686	3
Penhallow v. Mersey Docks and Harbour Board, 30 L. J. Ex. 329; 9 W. R. 812	213
Penn v. Ward, 2 Cr. M. & R. 338	73
Penny v. Wimbledon Urban District Council, [1899] 2 Q. B. 72; 68 L. J. Q. B. 704; 80 L. T. 615; 47 W. R. 565	237, 242, 243
Perkins v. Smith, 1 Wils. 328	275, 277, 278
Perls v. Saalfeld, [1892] 2 Ch. 149; 61 L. J. Ch. 409; 66 L. T. 666; 40 W. R. 548	51, 52
Perring v. Harris, 2 M. & Rob. 5	280
Peter v. Kendal, 6 B. & C. 703; 30 R. R. 504	214
Peters v. Fleming, 6 M. & W. 42; 9 L. J. Ex. 81; 55 R. R. 495	5
— v. Jones, [1914] 2 K. B. 781; 83 L. J. K. B. 1115; 110 L. T. 937; 30 T. L. R. 421	102
— v. Opie, 2 Wms. Saund. 352	113
Peto v. Brighton, Uckfeld, &c., Railway Co., 1 H. & M. 468; 32 L. J. Ch. 677; 11 W. R. 874	61, 111
— v. Hague, 5 Esp. 134	185
Petrel, The, [1893] P. 320; 62 L. J. P. 92; 70 L. T. 417; 9 T. L. R. 566	145, 151, 153
Pharmaceutical Society v. Nash, [1911] 1 K. B. 520; 80 L. J. K. B. 416; 103 L. T. 802; 75 J. P. 151; 27 T. L. R. 147	268
— v. Wheeldon, 24 Q. B. D. 683; 59 L. J. Q. B. 400; 62 L. T. 727	268
— v. White, [1901] 1 K. B. 601; 70 L. J. K. B. 386; 84 L. T. 188; 49 W. R. 407	268
Phelon & Moore, Ltd. v. Keel, [1914] 3 K. B. 165; 83 L. J. K. B. 1516; 111 L. T. 214; 78 J. P. 247; 12 L. G. R. 950	204
Philadelphia, Wilmington and Baltimore Railroad Co. v. Quigley, 21 Howard's Rep. 202	293
Phillips v. Alhambra Co., [1901] 1 K. B. 59; 70 L. J. K. B. 26; 83 L. T. 431	129
— v. Clift, 4 H. & N. 168; 28 L. J. Ex. 153; 7 W. R. 295	73, 80, 85
— v. Foxall, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 27 L. T. 231; 20 W. R. 900	74, 76, 106
— v. Homfray, 24 Ch. D. 454; 52 L. J. Ch. 833; 49 L. T. 5; 32 W. R. 6	90, 92
— v. Jones, 1 A. & E. 333	6
Phillipson v. Hayter, L. R. 6 C. P. 38; 40 L. J. C. P. 14; 23 L. T. 556; 19 W. R. 130	3, 4
Pickard v. Sears, 6 A. & E. 469; 45 R. R. 538	177
— v. Smith, 10 C. B. (N. S.) 470; 4 L. T. 470	237, 240, 241
Pickering v. Gunning, Palm. 528	5
Pickwell v. Spencer, L. R. 7 Ex. 105; 41 L. J. Ex. 73; 27 L. T. 207	342
Pilkington v. Scott, 15 M. & W. 657; 15 L. J. Ex. 329; 71 R. R. 781	19, 20, 46, 47, 60
Pinto v. Santos, 5 Taunt. 447	71
Pittard v. Oliver, [1891] 1 Q. B. 474; 60 L. J. Q. B. 219; 64 L. T. 758; 39 W. R. 311; 7 T. L. R. 188	295, 301
Planché v. Colburn, 8 Bing. 14; 5 C. & P. 58; 34 R. R. 613	112, 116
Playford v. United Kingdom Electric Co., L. R. 4 Q. B. 706; 38 L. J. Q. B. 249; 21 L. T. 21; 17 W. R. 968	217
Plymouth, Countess of, v. Throgmorton, 1 Salk. 65	130
Pole v. Harrobin, 9 East, 416 n.; 3 Dougl. 61	20
— v. Leask, 29 L. J. Ch. 888; 33 L. J. Ch. 155; 8 L. T. 645	186
Poley v. Osborn, 10 Co. Rep. 130 b	86
Polhill v. Walter, 3 B. & Ad. 114; 37 R. R. 344	259

	PAGE
Poll v. Dambe, [1901] 2 K. B. 579; 70 L. J. K. B. 721; 84 L. T. 870; 50 W. R. 28	86
Popham v. Jones, 13 C. B. 225	180
Potter v. Faulkner, 1 B. & S. 800; 31 L. J. Q. B. 30; 5 L. T. 455; 10 W. R. 93	150
Pottle v. Sharp, 65 L. J. Ch. 908; 75 L. T. 265	110
Potts v. Plunkett, 9 Ir. C. L. R. 290	159
— v. Port Carlisle Dock and Railway Co., 8 W. R. 524; 2 L. T. 283	157
Poulton v. London and South Western Railway Co., L. R. 2 Q. B. 534; 36 L. J. Q. B. 294; 17 L. T. 11; 16 W. R. 309	223
— v. Wilson, 1 F. & F. 403	25
Poussard v. Spiers, 1 Q. B. D. 410; 45 L. J. Q. B. 621; 34 L. T. 572; 24 W. R. 819	85
Powell v. Evan Jones & Co., [1905] 1 K. B. 11; 74 L. J. K. B. 115; 92 L. T. 430; 53 W. R. 277; 21 T. L. R. 55	66, 193
— v. Hoyland, 6 Ex. 67; 20 L. J. Ex. 82	277
— v. McGlynn, [1902] 2 Ir. R. 154	235
— v. Rees, 7 A. & E. 426; 8 L. J. Q. B. 47; 35 R. R. 747	92
Powers v. Fowler, 4 E. & B. 511; 3 W. R. 166	19, 21
Powles v. Hider, 6 E. & B. 207; 25 L. J. Q. B. 331	211
Precious v. Abel, 1 Esp. 350	194
Prescott v. Flinn, 9 Bing. 19; 1 L. J. C. P. 145; 35 R. R. 508	181
Prestwick v. Marshall, 7 Bing. 565; 4 C. & P. 594	174
Price v. Green, 16 M. & W. 346; 16 L. J. Ex. 108; 73 R. R. 522	21, 51
— v. Marsh, 1 C. & P. 60	186
— v. Mouat, 11 C. B. (N. S.) 508	27, 76
— v. Torrington (Earl of), Salk. 285; 2 Sm. L. C. (12th ed.) 294	187
— v. Union Lighterage Co., [1904] 1 K. B. 412; 73 L. J. K. B. 222; 89 L. T. 731; 52 W. R. 325; 20 T. L. R. 177	213
Prickett v. Badger, 1 C. B. (N. S.) 296; 26 L. J. C. P. 33; 5 W. R. 117	116
Priestley v. Fernie, 3 H. & C. 977; 34 L. J. Ex. 172; 13 L. T. 208; 13 W. R. 1089	196, 258
— v. Fowler, 3 M. & W. 1; 7 L. J. Ex. 42; 49 R. R. 495	144, 145, 146, 149, 151, 153
Prince of Wales Assurance Society v. Harding, E. B. & E. 183; 27 L. J. Q. B. 297	180
Proctor v. Webster, 16 Q. B. D. 112; 55 L. J. Q. B. 150; 53 L. T. 765	298
Pulling v. Great Eastern Railway Co., 9 Q. B. D. 110; 51 L. J. Q. B. 453; 30 W. R. 798	274
Pullman v. Hill & Co., [1891] 1 Q. B. 524; 60 L. J. Q. B. 299; 64 L. T. 691; 39 W. R. 263; 7 T. L. R. 173	282, 286
Puttock v. Warr, 31 L. T. (O. S.) 86	185
Fybus v. Gibb, 6 E. & B. 902; 26 L. J. Q. B. 41; 5 W. R. 44	105
Pym v. Campbell, 6 E. & B. 370; 25 L. J. Q. B. 277	25

Q.

QUARMAN v. Burnett, 6 M. & W. 499; 9 L. J. Ex. 308; 4 Jur. 969; 55 R. R. 717	236, 237, 240, 241, 247, 249, 318, 343
Quickstep, The, 15 P. D. 196; 59 L. J. P. 65; 63 L. T. 713	239
Quinn v. Leatham, [1901] A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708	87, 88, 169, 170

R.

R. v. Ahrahah, 2 East, P. C. 569; 2 Leach, 824	310
— v. Allen, 7 C. & P. 183	270, 271
— v. Arnesby (Inhabitants), 3 B. & Ald. 584	6, 22
— v. Arundel (Inhabitants), 5 M. & S. 257; 17 R. R. 317	5
— v. Ashley, 1 C. & K. 198	32, 310
— v. Atkinson, 1 Leach, 302	333
— v. Atkinson, Car. & M. 525; 2 Moody, 278	324
— v. Bannen, 1 C. & K. 295; 2 Moody, 309	198
— v. Barnes, 2 Den. C. C. 59; 20 L. J. M. C. 34; 5 Cox, C. C. 112	316
— v. Barnes, L. R. 1 C. C. R. 45; 35 L. J. M. C. 204; 14 L. T. 601; 14 W. R. 805	311

R. v. Bass, 2 East, P. C. 566; 1 Leach, 251, 524	310, 333
— v. Batty, 2 Moody, 257	326
— v. Baxter, 5 Cox, C. C. 302	327
— v. Bayley, Bac. Abr. Libel, A. 2	297
— v. Bayley, 26 L. J. M. C. 4; 1 Dears. & B. 121; 5 W. R. 48	324
— v. Bazeley, 2 Leach, 835	321
— v. Beacall, 1 C. & P. 457	324
— v. Beaman, Carr. & M. 595	332
— v. Beaumont, Dears., C. C. 270; 23 L. J. M. C. 54; 2 W. R. 235	331, 332
— v. Beecham, 5 Cox, C. C. 181	315
— v. Beechey, Russ. & Ry. 319	331
— v. Bennett, 28 L. J. M. C. 27; 1 Bell, C. C. 1; 7 W. R. 40	199
— v. Betts, 16 Q. B. 1022	271
— v. Betts, 28 L. J. M. C. 69; 1 Bell, C. C. 90; 7 W. R. 239	313, 334
— v. Bigg, 3 P. Wms. 419	9
— v. Bilborough, 1 B. & Ald. 115	31
— v. Billingham, 5 A. & E. 676	32
— v. Birchall, 4 F. & F. 1087	270
— v. Birdbrooke, 4 T. R. 245	37
— v. Bishopton, 9 A. & E. 824	33
— v. Bleasdale, 2 C. & K. 765	199, 266
— v. Bowers, L. R. 1 C. C. R. 41; 35 L. J. M. C. 206; 14 L. T. 671; 14 W. R. 803	329
— v. Brackett, 4 Cox, C. C. 274	313
— v. Bradford, 1 M. & S. 151	91
— v. Brampton (Inhabitants), Cald. 11	77
— v. Bren, 33 L. J. M. C. 59; Leigh & C. 346; 9 L. T. 452; 12 W. R. 107	325
— v. Bull, 2 Leach, 841	320
— v. Bunkall, 33 L. J. M. C. 75; 9 Cox, C. C. 419; 9 L. T. 778	310
— v. Burgess, 32 L. J. M. C. 185; 8 L. T. 255; 11 W. R. 602	310
— v. Burton, 1 Moody 237	327
— v. Butler, 2 C. & K. 340	333, 334
— v. Byker, 2 B. & C. 114	35
— v. Callahan, 8 C. & P. 154	324
— v. Carpenter, L. R. 1 C. C. R. 29; 35 L. J. M. C. 169; 14 L. T. 572; 14 W. R. 773	327
— v. Carr, Russ. & Ry. 198	326
— v. Chandler, [1913] 1 K. B. 125; 82 L. J. K. B. 106; 108 L. T. 352; 77 J. P. 80; 23 Cox, C. C. 330; 29 T. L. R. 83	304
— v. Chapman, 1 C. & K. 119	336
— v. Charlesworth, 16 Q. B. 1012	271
— v. Cheeseman, 31 L. J. M. C. 89; Leigh & C. 140; 5 L. T. 717; 10 W. R. 255	313, 319
— v. Cheshunt, 1 B. & Ald. 473; 38 R. R. 564, 565	33
— v. Chillesford (Inhabitants), 4 B. & C. 94	6
— v. Chipchase, 2 East, P. C. 567; 2 Leach, 699	311
— v. Christopher, 28 L. J. M. C. 35; 1 Bell, C. C. 27; 7 W. R. 60	314
— v. Clapton, 3 Cox, C. C. 126	328
— v. Cooke, L. R. 1 C. C. R. 295; 40 L. J. M. C. 68; 24 L. T. 108; 19 W. R. 389	311, 316, 332
— v. Cornwall, 2 Str. 881	304
— v. Cranford (Inhabitants), 8 East, 25	22
— v. Crediton, 2 B. & Ad. 493; 9 L. J. M. C. (O. S.) 89	31, 32
— v. Creed, 1 C. & K. 63	334
— v. Cross, 3 Camp. 224; 13 R. R. 794	205
— v. Crow, 1 Lew. 88	331
— v. Cullum, L. R. 2 C. C. R. 28; 42 L. J. M. C. 64; 28 L. T. 571; 21 W. R. 687	323, 329
— v. Cumberland Justices, 5 D. & L. 430; 17 L. J. Q. B. 102; 79 R. R. 859	10
— v. Daniel, 6 Mod. 99, 182; 1 Salk. 380; Lord Raym. 1116	86
— v. De Banks, 13 Q. B. D. 29; 53 L. J. M. C. 132; 50 L. T. 427	319
— v. Dedham, Burr S. C. 653; 2 Bott. 292	36
— v. Dixon, 1 Dears., C. C. 580; 25 L. J. M. C. 39	314
— v. Dodderhill, 3 M. & S. 243	36
— v. Dolan, 24 L. J. M. C. 59; 1 Dears., C. C. 436; 3 W. R. 177	312
— v. Duffield, 5 Cox, C. C. 404	86
— v. Dukinfield, 11 Q. B. 678	187

	PAGE
R. v. Eccleston, 2 East, 298	31
— v. Edmond, 1 Hale, 554; Hutt, 20; Kel. 57	305
— v. Edwards, 8 C. & P. 611	270
— v. Egginton, 2 B. & P. 508; 2 Leach, 913; 5 R. R. 689	304
— v. Essex, 27 L. J. M. C. 20; 1 Dears. & B. 369; 6 W. R. 82	313, 324
— v. Evans, Carr. & M. 632	317
— v. Field, 5 T. R. 587	33
— v. Fisher, L. R. 1 C. C. R. 7; 35 L. J. M. C. 57; 13 L. T. 380; 14 W. R. 58	308
— v. Flowers, 16 Q. B. D. 643; 55 L. J. M. C. 179; 54 L. T. 547; 34 W. R. 367	317
— v. Foulkes, L. R. 2 C. C. R. 150; 44 L. J. M. C. 65; 32 L. T. 407; 23 W. R. 696	325
— v. Frankland, 32 L. J. M. C. 69; Leigh & C. 276; 7 L. T. 799; 11 W. R. 346	324
— v. Freeman, 5 C. & P. 534	326
— v. Friend, Russ. & Ry. 20	138
— v. Gale, 2 Q. B. D. 141; 46 L. J. M. C. 134; 35 L. T. 526	329, 332
— v. Gibbs, 1 Dears. C. C. 445; 24 L. J. M. C. 62; 6 Cox, C. C. 455 34, 317, 329	333
— v. Gill, 1 Dears. C. C. 289; 23 L. J. M. C. 50; 2 W. R. 222	207
— v. Gillyard, 12 Q. B. 527; 17 L. J. M. C. 153	205
— v. Gilroy, 4 Ct. Sess. Cas. (Third Ser.) 656	317
— v. Glass, 2 C. & K. 395; 1 Den. C. C. 215	327
— v. Glover, 33 L. J. M. C. 169; L. & C. 466; 9 Cox, C. C. 501; 10 L. T. 532	314
— v. Glyde, L. R. 1 C. C. R. 139; 37 L. J. M. C. 107; 18 L. T. 613; 16 W. R. 1174	317, 326
— v. Goodbody, 8 C. & P. 665	311, 332, 333
— v. Goode, Carr. & M. 582	304
— v. Gray, 1 Str. 481	270
— v. Gray, 4 F. & F. 1098	206
— v. Great North of England Railway Co., 9 Q. B. 315; 16 L. J. M. C. 16; 10 Jur. 755; 72 R. R. 262	31
— v. Great Wishford, 4 A. & E. 216; 5 L. J. M. C. 25	37
— v. Great Yarmouth, 5 M. & S. 114	270
— v. Green, 7 C. & P. 156	309
— v. Gregory, L. R. 1 C. C. R. 77; 36 L. J. M. C. 60; 16 L. T. 388; 15 W. R. 774	333, 335, 336
— v. Grove, 7 C. & P. 635; 1 Moody, 447	315
— v. Gruncell, 9 C. & P. 365	334
— v. Guelder, 30 L. J. M. C. 34; Bell, C. C. 284; 3 L. T. 337; 9 W. R. 38	270
— v. Haines, 2 C. & K. 368	324, 337
— v. Hall, 1 Moody, 474	315, 316
— v. Hall, 2 C. & K. 947; 1 Den. C. C. 381; 18 L. J. M. C. 62	37
— v. Hampreston, 5 T. R. 205	320
— v. Hampton, 84 L. J. K. B. 1137; 113 L. T. 378	36
— v. Hanbury, 2 East, 423	314
— v. Handley, Carr. & M. 547	312
— v. Harding, Russ. & Ry. 125	326
— v. Hartley, Russ. & Ry. 139	317
— v. Hassall, 30 L. J. M. C. 175; Leigh & C. 58; 4 L. T. 561; 9 W. R. 708	331
— v. Hastie, 32 L. J. M. C. 62; Leigh & C. 269; 7 L. T. 695; 11 W. R. 293	332
— v. Hawkins, 1 Den. C. C. 584; 4 Cox, C. C. 224	330
— v. Hawtin, 7 C. & P. 281	323
— v. Hayward, 1 C. & K. 518	323
— v. Hedge, Russ. & Ry. 160; 2 Leach, 1033	320, 333
— v. Hedges, 2 Leach, 1033; Russ. & Ry. 160	333
— v. Hey, 2 C. & K. 983; 1 Den. C. C. 602	238, 312, 317, 326
— v. Higgins, 2 East, 5; 6 R. R. 358	309
— v. Hipswell, (Inhabitants), 8 B. & C. 466	23
— v. Hodgson, 3 C. & P. 422	333
— v. Hoggins, Russ. & Ry. 145	326
— v. Holbrook, 3 Q. B. D. 60; 4 Q. B. D. 42; 47 L. J. Q. B. 35; 48 L. J. Q. B. 113; 37 L. T. 530; 39 L. T. 536; 26 W. R. 144; 27 W. R. 313	200
— v. Holloway, 2 C. & K. 944; 1 Den. C. C. 368; 18 L. J. M. C. 60 307, 308, 315	313
— v. Hornby, 1 C. & K. 305	313

	PAGE
R. v. Hoseason, 14 East, 605	232
— v. Huggins, 2 Str. 882; 2 Lord Raym. 1574	197
— v. Hughes, 1 Moody, 370	318, 326, 330
— v. Hughes, 26 L. J. M. C. 202; 1 Dears. & B. 248; 5 W. R. 732	270
— v. Hunt, 8 C. & P. 642	337
— v. Ightham, 4 A. & E. 937; 5 L. J. M. C. 105	31
— v. Iken, 2 A. & E. 147	33
— v. Instan, [1893] 1 Q. B. 450; 62 L. J. M. C. 86; 68 L. T. 420; 41 W. R. 368; 9 T. L. R. 248	138
— v. Ivens, 7 C. & P. 213; 48 R. R. 780	206
— v. Jackson, 1 C. & K. 384	333, 334
— v. Jackson, 2 Moody, 32	318
— v. James, 8 C. & P. 131	266
— v. Jarvis, 2 Mood. & Rob. 40	199
— v. Jarvis, L. R. 1 C. C. R. 96; 37 L. J. M. C. 1; 17 L. T. 178; 16 W. R. 111	310
— v. Jennings, 1 Dears. & B. 447; 6 W. R. 231; 7 Cox, C. C. 397	319
— v. Jenson, 1 Moody, 434	324
— v. Jeyes, 3 A. & E. 424	261
— v. Johnson, 3 M. & S. 539; 16 R. R. 352	323
— v. Johnson, Carr. & M. 218	304
— v. Johnson, 21 L. J. M. C. 32; 2 Den. C. C. 310	310, 313, 332, 333
— v. Jones, 4 C. & P. 217	306
— v. Jones, 7 C. & P. 833	333
— v. Jones, 8 C. & P. 288	335
— v. Keena, L. R. 1 C. C. R. 113; 37 L. J. M. C. 43; 17 L. T. 515; 16 W. R. 375	338
— v. Kent Justices, L. R. 8 Q. B. 305; 42 L. J. M. C. 112; 21 W. R. 635 ..	174
— v. Kerr, 8 C. & P. 176	314
— v. King's Lynn, 6 B. & C. 97	31, 32
— v. Ladock, Burr. S. C. 179; 2 Bott. 277; 1 Nol. P. L. 461	130
— v. Laindon, 8 T. R. 379	31
— v. Lamade, C. C. Court, Feb. 4, 1853	269
— v. Lambert, 2 Cox, C. C. 309	336
— v. Lambeth, 4 M. & S. 315	36
— v. Lambton, 5 Price, 428; 19 R. R. 645	259
— v. Lavender, Huntingdon Lent Assizes, 1793	311
— v. Ledger, 2 F. & F. 857	270
— v. Leech, 3 Stark. 70	326
— v. Leggett, 8 C. & P. 191	72
— v. Leonard, 2 C. & K. 514; 1 Den. C. C. 304; 3 Cox, C. C. 284	316
— v. Lichfield, 10 Q. B. 534; 16 L. J. Q. B. 333	10
— v. Light, 84 L. J. K. B. 865; 112 L. T. 1144; 31 T. L. R. 257	317
— v. Lister, 26 L. J. M. C. 26; 1 Dears. & B. 118; 5 W. R. 50	333, 334
— v. Little Bolton, 2 Bott. 316	31
— v. Longnor (Inhabitants), 4 B. & Ad. 647; 2 L. J. M. C. 32	22
— v. Long Whaddon, 5 T. R. 447	35
— v. Lord, 12 Q. B. 757; 17 L. J. M. C. 181; 12 Jur. 1001; 76 R. R. 415 ..	6
— v. Lovell, 2 M. & Rob. 236	323, 333
— v. Lynn, 8 A. & E. 379	33
— v. Lyth (Inhabitants), 5 T. R. 327	35
— v. Macclesfield, 3 T. R. 76	35
— v. Macdonald, 31 L. J. M. C. 67; Leigh & C. 85; 5 L. T. 330; 10 W. R. 21	326
— v. M'Namee, 1 Moody, 368	318, 319
— v. Manning, 22 L. J. M. C. 21; Dears. C. C. 21; 1 W. R. 40	315
— v. Marshall, 21 L. T. 796; 11 Cox, C. C. 490	329
— v. Martin, 6 C. & P. 562	105
— v. Masters, 2 C. & K. 930; 1 Den. C. C. 332; 18 L. J. M. C. 2 ...	321, 322, 333
— v. May, 30 L. J. M. C. 81; Leigh & C. 13; 3 L. T. 680; 9 W. R. 256 ...	328
— v. Medley, 6 C. & P. 292	205
— v. Meeres, 1 Show. 53	305
— v. Mellish, Russ. & Ry. 80	324
— v. Metcalfe, 1 Moody, 433	310, 313, 326
— v. Middleton, L. R. 2 C. C. R. 38; 42 L. J. M. C. 73; 28 L. T. 777	196
— v. Mills, 26 L. J. M. C. 79; 1 Dears. & B. 205; 5 W. R. 528	317
— v. Minster, 3 M. & S. 276	33

	PAGE
R. v. Mitcham, 12 East, 351	36
— v. Moah, Dears, C. C. 626; 25 L. J. M. C. 66; 4 W. R. 255; 7 Cox, C. C. 60	336
— v. Moore, 30 L. J. M. C. 77; Leigh & C. 1; 3 L. T. 710; 9 W. R. 276 ...	314
— v. Morfit, R. R. 307	314
— v. Murray, 1 Moody, 276; 5 C. & P. 145, n.	321, 333
— v. Mutters, 34 L. J. M. C. 54; 11 L. T. 642; 13 W. R. 326	310
— v. Negus, L. R. 2 C. C. R. 34; 42 L. J. M. C. 62; 28 L. T. 646; 21 W. R. 687	329
— v. Nether Knutsford, 1 B. & Ad. 726	31
— v. Nettleton, 1 Moody, 259	327
— v. Newton Toney, 2 T. R. 453	36
— v. Newtown, 1 A. & B. 238; 3 L. J. M. C. 79	31
— v. Norman, Carr. & M. 501	335
— v. Northowram, 9 Q. B. 24	31, 32
— v. Northwingfield (Inhabitants), 1 B. & Ad. 912	20, 35
— v. Norval, 1 Cox, C. C. 95	312
— v. Norwich Corporation, 30 W. R. 752	10
— v. Oates, 1 Dears. C. C. 459; 24 L. J. M. C. 123; 3 W. R. 402	316
— v. Odiham, 2 T. R. 622	36
— v. Oliphant, [1905] 2 K. B. 67; 74 L. J. K. B. 591; 53 W. R. 556; 69 J. P. 230; 21 T. L. R. 416	341
— v. Ossett-cum-Gawthorpe, 4 B. & Ad. 216; 2 L. J. M. C. 31	35
— v. Palin, [1906] 1 K. B. 7; 75 L. J. K. B. 15; 93 L. T. 673; 22 T. L. R. 41	341
— v. Paradise, 2 East, P. C. 565	310
— v. Parr, 2 Mood. & Rob. 346	199
— v. Parsons, 16 Cox, 498	327
— v. Pease, 4 B. & Ad. 30; 38 R. R. 207	206, 271
— v. Peck, 1 Salk. 66	130
— v. Pedly, 1 A. & E. 822; 3 L. J. M. C. 119; 40 R. R. 444	205
— v. Pendleton, 15 East, 449	35
— v. Pershore, 8 B. & C. 679	37
— v. Phetheon, 9 C. & P. 552	306
— v. Pocock, 17 Q. B. 34; 5 Cox, C. C. 172	270
— v. Ponsonby, 3 Q. B. 14	33
— v. Pool, 27 L. J. M. C. 53; 1 Dears. & B. 345; 6 W. R. 65; 7 Cox, C. C. 373	315
— v. Potter, 23 L. J. M. C. 170; 2 Den. C. C. 235; 3 C. & K. 179	306
— v. Poyser, 5 Cox, C. C. 241; 20 L. J. M. C. 191; 2 Den. C. C. 233	313
— v. Prest, 16 Q. B. 32; 20 L. J. Q. B. 17	10
— v. Preston, 21 L. J. M. C. 41; 2 Den. C. C. 353	314
— v. Prince, L. R. 1 C. C. R. 150; 38 L. J. M. C. 8; 19 L. T. 364; 17 W. R. 179	196
— v. Privett, 2 C. & K. 114; 1 Den. C. C. 193	314
— v. Pucklechurch, 5 East, 382	36
— v. Rainham, 1 East, 531	31, 32
— v. Read, 3 Q. B. D. 131; 47 L. J. M. C. 50; 37 L. T. 722; 26 W. R. 283	330
— v. Reed, Dears. C. C. 257; 23 L. J. M. C. 25; 2 W. R. 190	310, 312, 323
— v. Rees, 7 C. & P. 568	32
— v. Reynolds, 2 Cox, C. C. 170	333
— v. Richards, 1 C. & K. 532	315
— v. Rickingham (Inhabitants), 7 East, 373	35
— v. Ridley, 2 Camp. 650	138
— v. Ripon (Inhabitants), 9 East, 295	22
— v. Roberts, 3 Cox, C. C. 74	323
— v. Robins, 2 M. & Rob. 512	105
— v. Robinson, 2 East, P. C. 565	310
— v. Robson, 16 Q. B. D. 137; 55 L. J. M. C. 55; 53 L. T. 823; 34 W. R. 276	325
— v. Rogers, 3 Q. B. D. 28; 47 L. J. M. C. 11; 37 L. T. 473; 26 W. R. 61	338
— v. Rowlands, 17 Q. B. 671; 21 L. J. M. C. 81; 5 Cox, C. C. 466	86
— v. Rudick, 8 C. & P. 237	321
— v. Saffron Walden, 9 Q. B. 76; 15 L. J. M. C. 115; 72 R. R. 186	54
— v. St. Helen's, Auckland, 4 B. & Ad. 718; 2 L. J. M. C. 58	35
— v. St. Martin, Leicester (Inhabitants), 8 B. & C. 674	35

R. v. St. Martin's, Exeter (Inhabitants), 2 A. & E. 655; 1 H. & W. 69; 4 N. & M. (K. B.) 385	190
— v. St. Petrox (Inhabitants), 4 F. R. 196	5
— v. Sandhurst, 7 B. & C. 557	35
— v. Saunders, 7 C. & P. 277	198
— v. Saward, 5 Cox, C. C. 295	317
— v. Schmidt, L. R. 1 C. C. R. 15; 35 L. J. M. C. 94; 13 L. T. 679; 14 W. R. 286	312
— v. Scott, 3 Q. B. 543; 11 L. J. Q. B. 254; 6 Jur. 1084; 61 R. R. 309 ...	206, 271
— v. Seacroft, 2 M. & S. 472	33
— v. Selby Dam Drainage Commissioners, [1892] 1 Q. B. 348; 61 L. J. Q. B. 372; 66 L. T. 17; 8 T. L. R. 198	253
— v. Sharpe, 3 Railw. Cas. 33	271
— v. Shaw, 5 T. R. 549	261
— v. Shepherd, 1 Q. B. 170; 10 L. J. M. C. 44; 55 R. R. 241	33
— v. Shinfield (Inhabitants), 14 East, 541	5, 116
— v. Silvester, 33 L. J. M. C. 79; 9 L. T. 682; 12 W. R. 375	273
— v. Smallman, [1897] 1 Q. B. 4; 66 L. J. Q. B. 82; 75 L. T. 394; 45 W. R. 249; 13 T. L. R. 28	327
— v. Smith, Russ. & Ry. 267	324, 333
— v. Smith, Russ. & Ry. 516	330, 331
— v. Smith, 8 C. & P. 153	139
— v. Smith, 1 C. & K. 423	311, 333
— v. Smith, 34 L. J. M. C. 153; 10 Cox, 82; 12 L. T. 608; 13 W. R. 816	138
— v. Solomons, [1909] 2 K. B. 980; 79 L. J. K. B. 8; 101 L. T. 496; 73 J. P. 467; 25 T. L. R. 747	341
— v. South Newton, 10 B. & C. 838	35
— v. Sow (Inhabitants), 1 B. & Ald. 178	35
— v. Spears, 2 East, P. C. 568; 2 Leach, 825	310, 312, 323
— v. Spencer, Russ. & Ry. 299	326, 330
— v. Spurrell, L. R. 1 Q. B. 72; 35 L. J. M. C. 74; 13 L. T. 364; 14 W. R. 81	32
— v. Squires, Russ. & Ry. 349; 2 Stark. 349	326
— v. Stainer, L. R. 1 C. C. R. 230; 39 L. J. M. C. 54; 21 L. T. 758; 18 W. R. 439	337
— v. Stamford (Mayor of), 6 Q. B. 433; 66 R. R. 449	9
— v. Stanbury, 2 Cox, C. C. 272	330
— v. Stephens, L. R. 1 Q. B. 702; 35 L. J. Q. B. 251; 7 B. & S. 710; 10 Cox, C. C. 340; 14 L. T. 593; 14 W. R. 859	205
— v. Stock, 2 Taunt. 339; 11 R. R. 605	32
— v. Stock, 1 Moody, 87	312
— v. Stoke-upon-Trent (Inhabitants), 5 Q. B. 303; 13 L. J. M. C. 41; 8 Jur. 34	27, 28
— v. Stokesley (Inhabitants), 6 T. R. 757	35
— v. Stuart, [1894] 1 Q. B. 310; 63 L. J. M. C. 63; 70 L. T. 44; 42 W. R. 303	324
— v. Sullens, 1 Moody, 129	333
— v. Swindall, 2 C. & K. 230	273
— v. Tankard, [1894] 1 Q. B. 548; 63 L. J. M. C. 61; 70 L. T. 42; 42 W. R. 350	325, 337
— v. Taylor, 15 East, 460	266
— v. Taylor, 9 C. & P. 672	270
— v. Terrott, 3 East, 506; 7 R. R. 502	33
— v. Thames Ditton (Inhabitants), 4 Doug. 300	117
— v. Thomas, 9 C. & P. 741	333
— v. Thompson, 32 L. J. M. C. 57; Leigh & C. 233; 7 L. T. 393; 11 W. R. 41	316
— v. Thorley, 1 Moody, 343	331
— v. Thorpe, Dears. & B. 562; 27 L. J. M. C. 264; 6 W. R. 502	332
— v. Thurborn, 2 C. & K. 831; 1 Den. C. C. 387; 18 L. J. M. C. 140	314
— v. Tibble, 4 E. & B. 888; 24 L. J. M. C. 104	269
— v. Tideswell, [1905] 2 K. B. 273; 74 L. J. K. B. 725; 93 L. T. 111; 21 T. L. R. 531	313
— v. Tite, 30 L. J. M. C. 142; Leigh & C. 29; 4 L. T. 259; 9 W. R. 554	326, 328
— v. Tiverton, 30 L. J. M. C. 79; 3 L. T. 696	33
— v. Tongue, 30 L. J. M. C. 49; Bell, C. C. 289; 3 L. T. 415; 9 W. R. 59	326, 330

	PAGE
<i>R. v. Train</i> , 3 F. & F. 22; 31 L. J. M. C. 169; 10 W. R. 539	206
— <i>v. Trainer</i> , 4 F. & F. 105	270
— <i>v. Treadgold</i> , 48 L. J. M. C. 102; 39 L. T. 291	338
— <i>v. Trebilcock</i> , 1 Dears. & Bell. C. C. 453; 27 L. J. M. C. 103; 6 W. R. 281	307
— <i>v. Tynemouth</i> , 12 East, 46; 11 R. R. 328	33
— <i>v. Tyree</i> , L. R. 1 C. C. R. 177; 38 L. J. M. C. 58; 19 L. T. 657; 17 W. R. 334	325
— <i>v. Villensky</i> , [1892] 2 Q. B. 597; 61 L. J. M. C. 218; 41 W. R. 160	312
— <i>v. Waite</i> , 1 Leach, 28; 2 East, P. C. 570	321
— <i>v. Walbottle</i> , 9 Q. B. 248; 15 L. J. M. C. 153	35
— <i>v. Walker</i> , 27 L. J. M. C. 207; 1 Dears. & B. 600; 4 Jur. (N. S.) 465; 6 W. R. 505	34, 328
— <i>v. Walsh</i> , 4 Taunt. 258; Russ. & Ry. 215; 2 Leach, 1054	310, 333
— <i>v. Wantage</i> , 1 East, 601	91
— <i>v. Warminster</i> , 6 B. & C. 77	36
— <i>v. Watts</i> , 2 Esp. 675; 5 R. R. 766	208
— <i>v. Watts</i> , 2 Den. C. C. 14; 19 L. J. M. C. 192; 4 Cox, C. C. 336	321, 324, 333
— <i>v. Webb</i> , Moo. C. C. 431	315
— <i>v. Welch</i> , 2 C. & K. 296; 1 Den. C. C. 199	326, 336
— <i>v. Welch</i> , 2 E. & B. 357; 22 L. J. M. C. 145	19, 47, 60
— <i>v. Welford (Inhabitants)</i> , Cald. 57	77
— <i>v. Wenmouth</i> , 8 Cox, C. C. 348	305
— <i>v. Weyhill (Inhabitants)</i> , 2 Bott. 271; 1 Wm. Bl. 206	35
— <i>v. White</i> , 8 C. & P. 742	326
— <i>v. White</i> , 9 C. & P. 344	313
— <i>v. Whitnash (Inhabitants)</i> , 7 B. & C. 596	21
— <i>v. Whittingham</i> , 2 Leach, 913	313
— <i>v. Wilkins</i> , 1 Leach, 520; 3 R. R. 718	310
— <i>v. Williams</i> , 6 C. & P. 626	330
— <i>v. Williams</i> , 7 C. & P. 338	334
— <i>v. Williams</i> , 79 L. T. 739	341
— <i>v. Winnall</i> , 5 Cox, C. C. 326	326, 330
— <i>v. Woodburn & Coke</i> , 17 How. St. Tr. 54	198
— <i>v. Worfield (Inhabitants)</i> , 5 T. R. 506	34, 35
— <i>v. Wortley</i> , 2 Den. C. C. 333; 21 L. J. M. C. 44	24, 334
— <i>v. Wright</i> , 9 C. & P. 554, <i>n.</i>	306
— <i>v. Wright</i> , 1 Dears. & Bell. C. C. 431; 27 L. J. M. C. 65; 6 W. R. 255	311, 322
<i>Radley v. London and North Western Railway Co.</i> , 1 App. Cas. 754; 46 L. J. Ex. 573; 35 L. T. 637; 25 W. R. 147	162, 229
— <i>v. London County Council</i> , 109 L. T. 162; 11 L. G. R. 1035; 29 T. L. R. 680	225
<i>Raleigh v. Goschen</i> , [1898] 1 Ch. 73; 67 L. J. Ch. 59; 77 L. T. 429; 46 W. R. 90; 14 T. L. R. 36	251, 279
<i>Ramazotti v. Bowring</i> , 7 C. B. (N. S.) 851; 29 L. J. C. P. 30; 8 W. R. 114; 6 Jur. (N. S.) 172	177, 196
<i>Ramoneur Co., Ltd. v. Brixey</i> , 104 L. T. 809; 55 S. J. 480	56
<i>Randell v. Trimen</i> , 18 C. B. 786; 25 L. J. C. P. 307	259
<i>Rannie v. Irvine</i> , 7 M. & G. 969; 14 L. J. C. P. 10; 8 Jur. 1051; 66 R. R. 818	52, 58
<i>Rapson v. Cubitt</i> , 9 M. & W. 710; 11 L. J. Ex. 271; 60 R. R. 873	238
<i>Ratcliffe v. Evans</i> , [1892] 2 Q. B. 524; 61 L. J. Q. B. 535; 66 L. T. 794; 40 W. R. 578; 8 T. L. R. 597	284
<i>Ravensworth, Re, Ravensworth v. Tindale</i> , [1905] 2 Ch. 1; 74 L. J. Ch. 353; 92 L. T. 490; 21 T. L. R. 357	345
<i>Rawlings v. Bell</i> , 1 C. B. 951; 14 L. J. C. P. 265	141
— <i>v. Chandler</i> , 9 Ex. 687	122
<i>Raymond v. Minton</i> , L. R. 1 Ex. 244; 35 L. J. Ex. 153; 14 L. T. 367; 14 W. R. 675	72
<i>Rayner v. Mitchell</i> , 2 C. P. D. 357; 25 W. R. 633	220
<i>Rayson v. South London Tramways Co.</i> , [1893] 2 Q. B. 304; 62 L. J. Q. B. 593; 69 L. T. 491; 42 W. R. 21; 9 T. L. R. 579	214
<i>Read v. Dunsmore</i> , 9 C. & P. 588	79
— <i>v. Friendly Society of Operative Stone Masons</i> , [1902] 2 K. B. 732; 71 L. J. K. B. 994; 87 L. T. 493; 51 W. R. 115; 66 J. P. 822; 19 T. L. R. 20	170
— <i>v. Great Eastern Railway Co.</i> , L. R. 3 Q. B. 555; 37 L. J. Q. B. 278; 18 L. T. 82; 16 W. R. 1040	165

	PAGE
Read <i>v.</i> Legard, 6 Ex. 636; 20 L. J. Ex. 309	8
Redgate <i>v.</i> Haynes, 1 Q. B. D. 89; 45 L. J. M. C. 65; 33 L. T. 779	203
Reedie <i>v.</i> London and North Western Railway Co., 4 Ex. 244; 20 L. J. Ex. 65; 13 Jur. 659; 80 R. R. 541	233, 237, 238, 248
Reid <i>v.</i> Burrows, [1892] 2 Ch. 413; 61 L. J. Ch. 448; 67 L. T. 183; 40 W. R. 620; 8 T. L. R. 538	58
— <i>v.</i> Dreaper, 6 H. & N. 813; 30 L. J. Ex. 268; 4 L. T. 650	257
— <i>v.</i> Explosives Co., 19 Q. B. D. 264; 56 L. J. Q. B. 388; 57 L. T. 439; 35 W. R. 509	114, 126
— <i>v.</i> Hoskins, 6 E. & B. 953; 26 L. J. Q. B. 5; 3 Jur. (N. S.) 238	110
Reigate <i>v.</i> Union Manufacturing Co. (Ramsbottom), Ltd., [1918] 1 K. B. 592; 87 L. J. K. B. 724; 118 L. T. 479	126
Reignald's Case, Cro. Car. 563	284
Rendall <i>v.</i> Blair, 45 Ch. D. 139; 59 L. J. Ch. 641; 63 L. T. 265; 38 W. R. 689	110
Renno <i>v.</i> Bennett, 3 Q. B. 768; 12 L. J. Q. B. 17	74
Renshaw <i>v.</i> Queen Anne Residential Co., [1897] 1 Q. B. 662; 66 L. J. Q. B. 496; 76 L. T. 611; 45 W. R. 487	115
Reuss <i>v.</i> Picksley, L. R. 1 Ex. 342; 35 L. J. Ex. 218; 15 L. T. 25; 14 W. R. 924	18, 21
Reuter's Telegram Co. <i>v.</i> Byron, 43 L. J. Ch. 661	68
Reynell <i>v.</i> Lewis, 15 M. & W. 517; 16 L. J. Ex. 25; 71 R. R. 751	189
Reynolds <i>v.</i> Bridge, 6 E. & B. 528; 26 L. J. Q. B. 12; 4 W. R. 640	58
Rhodes, <i>In re</i> , 44 Ch. D. 94; 59 L. J. Ch. 298; 62 L. T. 342; 38 W. R. 385 ...	8
— <i>v.</i> Forwood, 1 App. Cas. 256; 47 L. J. Ex. 396; 34 L. T. 890; 24 W. R. 1078	43
Rhymney Railway Co. <i>v.</i> Brecon, &c., Railway Co., 83 L. T. 111; 49 W. R. 116	109
Rich <i>v.</i> Basterfield, 4 C. B. 783; 16 L. J. C. P. 273; 72 R. R. 716	205
Richards <i>v.</i> Easto, 15 M. & W. 244; 3 D. & L. 515; 15 L. J. Ex. 163	210
— <i>v.</i> Hayward, 2 M. & G. 574; 10 L. J. C. P. 108	63
— <i>v.</i> West Middlesex Waterworks Co., 15 Q. B. D. 660; 54 L. J. Q. B. 551; 33 W. R. 902	211
Richardson <i>v.</i> Cartwright, 1 C. & K. 328	179
— <i>v.</i> Dunn, 8 C. B. (N. S.) 655; 30 L. J. C. P. 44; 2 L. T. 430; 8 W. R. 582	259
— <i>v.</i> Greese, 3 Atk. 65	347
— <i>v.</i> Williamson, 1 L. R. 6 Q. B. 276; 40 L. J. Q. B. 145	259
Ricketts <i>v.</i> Bennett, 4 C. B. 686; 17 L. J. C. P. 17; 72 R. R. 691	187
— <i>v.</i> Thos. Tilling, Ltd., [1915] 1 K. B. 644; 84 L. J. K. B. 342; 112 L. T. 137; 31 T. L. R. 17	223
Ridgway <i>v.</i> Hungerford Market Co., 3 A. & E. 171; 4 L. J. K. B. 157; 42 R. R. 352	37, 74, 79, 133
— <i>v.</i> Wharton, 6 H. L. C. 238; 27 L. J. Ch. 46; 5 W. R. 804	18
Riding <i>v.</i> Smith, 1 Ex. D. 91; 45 L. J. Ex. 281; 34 L. T. 500; 24 W. R. 487 ...	284
Riley <i>v.</i> Baxendale, 6 H. & N. 445; 30 L. J. Ex. 87	143
— <i>v.</i> Packington, L. R. 2 C. P. 536; 36 L. J. C. P. 204; 16 L. T. 382; 15 W. R. 746	180
Rimell <i>v.</i> Sampayo, 1 C. & P. 254	194
Rimmer <i>v.</i> Webster, [1902] 2 Ch. 163; 71 L. J. Ch. 561; 86 L. T. 491; 50 W. R. 517; 18 T. L. R. 548	189
Rishton <i>v.</i> Grissell, 5 Eq. 326	31
Rist <i>v.</i> Faux, 4 B. & S. 409; 32 L. J. Q. B. 386; 8 L. T. 737; 11 W. R. 918	103
Robb <i>v.</i> Green, [1895] 2 Q. B. 315; 64 L. J. Q. B. 593; 73 L. T. 15; 44 W. R. 25; 11 T. L. R. 517	65, 68
Robbins <i>v.</i> Fennell, 11 Q. B. 248; 17 L. J. Q. B. 77; 12 Jur. 157; 75 R. R. 363	71
Roberts, <i>In re</i> , [1900] 1 Q. B. 122; 69 L. J. Q. B. 19; 81 L. T. Rep. 467; 48 W. R. 132; 16 T. L. R. 29	14
— <i>v.</i> Gray, [1913] 1 K. B. 520; 82 L. J. K. B. 362; 108 L. T. 232; 29 T. L. R. 149; 57 S. J. 143	5, 6
— <i>v.</i> Ogilby, 9 Price, 269; 23 R. R. 671	70
— <i>v.</i> Smith, 2 H. & N. 213; 26 L. J. Ex. 319	156
— <i>v.</i> Smith, 4 H. & N. 315; 28 L. J. Ex. 164	120, 121
— <i>v.</i> Watkins, 14 C. B. (N. S.) 592; 32 L. J. C. P. 291; 8 L. T. 460; 11 W. R. 783	122
— <i>v.</i> Woodward, 25 Q. B. D. 412; 59 L. J. M. C. 129; 63 L. T. 200; 38 W. R. 770	198
Robertson <i>v.</i> Buchanan, 90 L. T. 390	55
Robins <i>v.</i> Power, 4 C. B. (N. S.) 778; 27 L. J. C. P. 257	116

	PAGE
Robinson v Beaconsfield R. D. C., [1911] 2 Ch. 188; 80 L. J. Ch. 647; 105 L. T. 121; 75 J. P. 353; 27 T. L. R. 478	249
— v. Davison, L. R. 6 Ex. 269; 40 L. J. Ex. 172; 24 L. T. 755; 19 W. R. 1036	64
— v. Hindman, 3 Esp. 235	77
Robinson & Co., Ltd. v. Heuer, [1898] 2 Ch. 451; 67 L. J. Ch. 644; 79 L. T. 281; 47 W. R. 34	51, 53, 60
Roe v. Pierce, 2 Campb. 96; 11 R. R. 673	214
Rogers, <i>In re</i> ; <i>Ex parte</i> Collins, [1894] 1 Q. B. 425; 63 L. J. Q. B. 178; 70 L. T. 107; 10 T. L. R. 24	15
— v. Clifton, 3 B. & P. 587	291, 300
— v. Lambert, [1891] 1 Q. B. 318; 60 L. J. Q. B. 187; 64 L. T. 406; 39 W. R. 114	260
— v. Macnamara, 14 C. B. 27; 23 L. J. C. P. 1; 2 W. R. 19	303
— v. Maddocks, [1892] 3 Ch. 346; 62 L. J. Ch. 219; 67 L. T. 329	51, 52
Roper v. Knott, [1898] 1 Q. B. 868; 67 L. J. Q. B. 574; 78 L. T. 594; 46 W. R. 636; 14 T. L. R. 393	308
Rosiere v. Sawkins, Holt, K. B. 460	98
Ross v. Parkyns, 20 Eq. 331; 44 L. J. Ch. 610; 30 L. T. 331; 24 W. R. 5 ...	30
Rossiter v. Trafalgar Life Assurance Association, 27 Beav. 377	193
Rourke v. White Moss Colliery Co., 2 C. P. D. 205; 46 L. J. C. P. 283; 36 L. T. 49; 25 W. R. 263	234
Rousillon v. Rousillon, 14 Ch. D. 351; 49 L. J. Ch. 338; 42 L. T. 679; 28 W. R. 623	51, 53
Routledge v. Hislop, 2 E. & E. 549; 29 L. J. M. C. 90; 2 L. T. 53; 8 W. R. 363	124
Rowning v. Goodchild, 5 Burr. 2716; 3 Wils. 443; 2 W. Bl. 906	280
Royal Aquarium, Ltd. v. Parkinson, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T. 513; 40 W. R. 450; 8 T. L. R. 352	299, 300
Rubel Bronze and Metal Co. and Vos, <i>In re</i> , [1918] 1 K. B. 315; 87 L. J. K. B. 466; 118 L. T. 348; 34 T. L. R. 171	44, 112
Ruddiman v. Smith, 60 L. T. 708; 5 T. L. R. 417	217
Rumsey v. Webb, 11 L. J. C. P. 129; 59 R. R. 821	285, 300
Rusby v. Scarlett, 5 Esp. 76	179
Russell v. Shinn, 2 F. & F. 395	73
Russell's Patent, <i>In re</i> , 2 De G. & J. 130; 6 W. R. 95	94
Rust v. Nottidge, 1 E. & B. 99; 22 L. J. Q. B. 73	46
Ryan v. Fowler, 24 New York, 410	148
— v. Jenkinson, 25 L. J. Q. B. 11	41
Ryder v. Wombwell, L. R. 4 Ex. 32; 38 L. J. Ex. 8; 19 L. T. 491; 17 W. R. 167	5
S.	
S. v. S., 16 Cox, C. C. 566; 24 L. R. Ir. 235	100
Sack v. Ford, 13 C. B. (N. S.) 90; 32 L. J. C. P. 12	237
Sadgrove v. Hole, [1901] 2 K. B. 1; 79 L. J. K. B. 455; 84 L. T. 647; 49 W. R. 473	286, 301
Sadler v. Evans, 4 Burr. 1985	260, 262
— v. Henlock, 4 E. & B. 570; 24 L. J. Q. B. 138	237, 240
— v. Johnson, 16 M. & W. 775; 16 L. J. Ex. 178; 73 R. R. 714	25
Said v. Butt, [1920] 3 K. B. 497; 36 T. L. R. 762	279
St. Annes (Churchwardens) v. Linnæan Society, 3 E. & B. 793; 23 L. J. M. C. 148; 2 W. R. 516	32
St. Helens District Tramways Co. v. Wood, 60 L. J. M. C. 141	204
St. Nicholas, Rochester (Overseers) v. St. Botolph (Overseers), 12 C. B. (N. S.) 645; 31 L. J. M. C. 258; 6 L. T. 495	22
Sainter v. Ferguson, 1 Mac. & G. 286	60
— v. Ferguson, 7 C. B. 716; 18 L. J. C. P. 217; 13 Jur. 828; 78 R. R. 804	20
Salford (Mayor of) v. Lever, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39; 63 L. T. 658; 7 T. L. R. 18	66
Salop (Countess of) v. Crompton, Cro. Eliz. 777, 784	67
Salton v. New Beeston Cycle Co., [1900] 1 Ch. 43; 69 L. J. Ch. 20; 81 L. T. 437; 48 W. R. 92; 16 T. L. R. 25	255
Sammell v. Wright, 5 Esp. 263	235
Sandeman v. Scurr, L. R. 2 Q. B. 86; 36 L. J. Q. B. 58; 15 L. T. 608; 15 W. R. 277	180

Sanderson <i>v.</i> Aston, L. R. 8 Ex. 73; 42 L. J. Ex. 64; 28 L. T. 35; 21 W. R. 293	106
— <i>v.</i> Baker, 3 Wils. 309	198
— <i>v.</i> Bell, 2 Cr. & M. 304; 3 L. J. Ex. 66; 39 R. R. 776	185
— <i>v.</i> Collins, [1904] 1 K. B. 628; 73 L. J. K. B. 358; 90 L. T. 243; 52 W. R. 354; 20 T. L. R. 249	246
Sands <i>v.</i> Child, 3 Lev. 352	273
Saunders <i>v.</i> Wakefield, 4 B. & Ald. 595; 23 R. R. 409	18
— <i>v.</i> Whittle, 33 L. T. 816; 24 W. R. 406	132, 134
Savage <i>v.</i> Walthew, 11 Mod. 135	67
Savoy Hotel Co. <i>v.</i> London County Council, [1900] 1 Q. B. 665; 69 L. J. Q. B. 274; 82 L. T. 56; 48 W. R. 351; 64 J. P. 262; 16 T. L. R. 148	40
Saxon <i>v.</i> Blake, 29 Beav. 438	254
Scarborough <i>v.</i> Cosgrove, [1905] 2 K. B. 805; 74 L. J. K. B. 892; 93 L. T. 530; 54 W. R. 100; 21 T. L. R. 754	245
Scarman <i>v.</i> Castell, 1 Esp. 270	139
Schinotti <i>v.</i> Bumsted, 6 T. R. 646	281
Schofield <i>v.</i> Schunck, 5 E. & B. 858, <i>n.</i>	162
Schulz <i>v.</i> Third Avenue Railway Co., 89 N. Y. 242	221
Scott <i>v.</i> Avery, 5 H. L. C. 811; 25 L. J. Ex. 308	122
— <i>v.</i> Ebury (Lord), L. R. 2 C. P. 255; 36 L. J. C. P. 161; 15 L. T. 506; 15 W. R. 517	257
— <i>v.</i> Great and Little Clifton School Board, 14 Q. B. D. 500; 52 L. T. 105; 33 W. R. 368	10
— <i>v.</i> Liverpool Corporation, 3 De G. & J. 334; 5 Jur. 105; 28 L. J. Ch. 230	122
— <i>v.</i> Rayment, 7 Eq. 112; 38 L. J. Ch. 48; 19 L. T. 481	110
— <i>v.</i> Seymour (Lord), 31 L. J. Ex. 457; 32 L. J. Ex. 61; 6 L. T. 607; 8 L. T. 511; 10 W. R. 739; 11 W. R. 169	339
Seaman <i>v.</i> Bigg, Cro. Car. 480	284
Searle <i>v.</i> Lindsay, 11 C. B. (N. S.) 429; 31 L. J. C. P. 106; 5 L. T. 427; 10 W. R. 89	157
— <i>v.</i> Reynolds, 7 B. & S. 704; 35 L. J. Q. B. 18	205
Sellen <i>v.</i> Norman, 4 C. & P. 80	124, 140
Senior <i>v.</i> Ward, 1 E. & E. 385; 28 L. J. Q. B. 139; 7 W. R. 261	163
Serendat <i>v.</i> Saisse, L. R. 1 P. C. 152; 35 L. J. P. C. 17; 14 W. R. 487	210, 237
Serres Estate, <i>In re</i> ; Venes <i>v.</i> Marriott, 31 L. J. Ch. 519; 6 L. T. 892; 10 W. R. 751	347
Seymour <i>v.</i> Greenwood, 7 H. & N. 355; 30 L. J. Ex. 189, 327; 4 L. T. 833; 9 W. R. 785	224
— <i>v.</i> Maddox, 16 Q. B. 326; 20 L. J. Q. B. 327	148
Shackell <i>v.</i> Rosier, 2 Bing. N. C. 634; 5 L. J. C. P. 193; 42 R. R. 666	21, 69
Shanley <i>v.</i> Hervey, 20 How. St. Tr. 55	91
Sharland, <i>In re</i> ; Kemp <i>v.</i> Rozey, [1896] 1 Ch. 517; 65 L. J. Ch. 280; 74 L. T. 20	346
— <i>v.</i> Mildon, 5 Hare, 469; 15 L. J. Ch. 434; 71 R. R. 180	263
Sharp <i>v.</i> Powell, L. R. 7 C. P. 253; 41 L. J. C. P. 95; 26 L. T. 436; 20 W. R. 584	227
— <i>v.</i> Waterhouse, 7 E. & B. 816; 27 L. J. Q. B. 70	46
Sharrod <i>v.</i> London and North Western Railway Co., 4 Ex. 580; 7 D. & L. 213	249
Shaw <i>v.</i> Great Western Railway Co., [1894] 1 Q. B. 373; 70 L. T. 218; 42 W. R. 285; 10 T. L. R. 476	212, 213
— <i>v.</i> Lawless, 5 Cl. & F. 129; 47 R. R. 41	348
Sheffield Corporation <i>v.</i> Barclay, [1905] A. C. 392; 74 L. J. K. B. 747; 93 L. T. 83; 54 W. R. 49; 21 T. L. R. 642	141
Shenton <i>v.</i> Smith, [1895] A. C. 229; 64 L. J. P. C. 119; 72 L. T. 130; 43 W. R. 637	38
Shepherd <i>v.</i> Conquest, 17 C. B. 427; 25 L. J. C. P. 127; 4 W. R. 283	94, 97
Sheridan <i>v.</i> New Quay Co., 4 C. B. (N. S.) 618; 28 L. J. C. P. 58	260
Sherras <i>v.</i> De Rutzen, [1895] 1 Q. B. 918; 64 L. J. M. C. 218; 72 L. T. 839; 43 W. R. 526; 11 T. L. R. 369	202
Shine, <i>In re</i> , [1892] 1 Q. B. 522; 61 L. J. Q. B. 253; 66 L. T. 146; 40 W. R. 396; 8 T. L. R. 279	15
Shipley <i>v.</i> Todhunter, 7 C. & P. 680	300
Shipton <i>v.</i> Cardiff Corporation, 116 L. T. 687; 15 L. G. R. 587	120
Shipway <i>v.</i> Broadwood, [1899] 1 Q. B. 369; 68 L. J. Q. B. 360; 80 L. T. 11; 15 T. L. R. 145	65

	PAGE
Simmons, <i>Ex parte</i> , 30 L. T. (O. S.) 311	127
— <i>v. Wilmott</i> , 3 Esp. 91	139
Simons <i>v. Monier</i> , 29 Barb. 420	248
Sims <i>v. Brittain</i> , 4 B. & Ad. 375	70, 71
Skerritt <i>v. Scallan</i> , Ir. R. 11 C. L. 389	153, 157
Skillett <i>v. Fletcher</i> , L. R. 2 C. P. 469; 36 L. J. C. P. 206; 16 L. T. 426; 15 W. R. 876	105
Skipp <i>v. Eastern Counties Railway Co.</i> , 9 Ex. 223; 23 L. J. Ex. 23	156, 161
Skittrell <i>v. Showell</i> , 59 L. J. M. C. 26; 61 L. T. 874	269
Sleath <i>v. Wilson</i> , 9 C. & P. 607; 2 M. & Rob. 181	219, 220
Slim <i>v. Great Northern Railway Co.</i> , 14 C. B. 647; 23 L. J. C. P. 166	212
Smart <i>v. West Ham Union</i> , 10 Ex. 867; 11 Ex. 867; 24 L. J. Ex. 201	12
Smethurst <i>v. Taylor</i> , 12 M. & W. 545; 14 L. J. Ex. 86	192
Smith <i>v. Bailey</i> , [1891] 2 Q. B. 403; 60 L. J. Q. B. 779; 65 L. T. 331; 40 W. R. 28	235
— <i>v. Baker & Sons</i> , [1891] A. C. 325; 60 L. J. Q. B. 683; 65 L. T. 467; 7 T. L. R. 679	155, 158, 161
— <i>v. Birmingham Gas Co.</i> , 1 A. & E. 526; 40 R. R. 358	214
— <i>v. Blakey</i> , L. R. 2 Q. B. 326; 36 L. J. Q. B. 156; 15 W. R. 492	187
— <i>v. Bromley</i> , 2 Doug. 695 <i>n.</i>	262
— <i>v. Cartwright</i> , 6 Ex. 927; 20 L. J. Ex. 401	9
— <i>v. Cator</i> , 2 B. & Ald. 778	25
— <i>v. General Motor Cab Co., Ltd.</i> , [1911] A. C. 188; 80 L. J. K. B. 839; 105 L. T. 113; 27 T. L. R. 370	34, 211
— <i>v. Gold Coast and Ashanti Explorers, Ltd.</i> , [1903] 1 K. B. 285, 538; 72 L. J. K. B. 235; 88 L. T. 442; 51 W. R. 373; 19 T. L. R. 268	17
— <i>v. Gould</i> , 2 Salk. 667	90
— <i>v. Hancock</i> , [1894] 2 Ch. 377; 63 L. J. Ch. 477; 70 L. T. 578; 42 W. R. 456; 10 T. L. R. 433	56
— <i>v. Hayward</i> , 7 A. & E. 544; 7 L. J. Q. B. 3	116
— <i>v. Hodgeskins</i> , Cro. Car. 276	294
— <i>v. Hull Glass Co.</i> , 11 C. B. 897; 19 L. J. C. P. 123; 79 R. R. 680 ...	180, 181
— <i>v. Keal</i> , 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76	209
— <i>v. London and St. Katharine's Docks</i> , L. R. 3 C. P. 326; 37 L. J. C. P. 217; 18 L. T. 403; 16 W. R. 728	172
— <i>v. M'Guire</i> , 3 H. & N. 554; 27 L. J. Ex. 465; 6 W. R. 726	181, 183, 190
— <i>v. Martin and the Corporation of Kingston-upon-Hull</i> , [1911] 2 K. B. 775; 80 L. J. K. B. 1256; 105 L. T. 281; 75 J. P. 433; 27 T. L. R. 468	253
— <i>v. Neale</i> , 2 C. B. (N. S.) 67; 26 L. J. C. P. 144; 5 W. R. 563	16, 21
— <i>v. Seghill</i> , L. R. 10 Q. B. 422; 44 L. J. M. C. 114; 32 L. T. 859; 23 W. R. 745	32
— <i>v. Sleaf</i> , 12 M. & W. 585	263
— <i>v. Smith</i> , 31 L. J. Ch. 91	347
— <i>v. Sorby</i> , 3 Q. B. D. 552, <i>n.</i>	66
— <i>v. South Eastern Railway Co.</i> , [1896] 1 Q. B. 178; 65 L. J. Q. B. 219; 73 L. T. 614; 44 W. R. 291	162, 229
— <i>v. Steele</i> , L. R. 10 Q. B. 125; 44 L. J. Q. B. 60; 32 L. T. 195; 23 W. R. 388	143, 153
— <i>v. Thompson</i> , 8 C. B. 44; 18 L. J. C. P. 314; 79 R. R. 401	28, 80
— <i>v. Walton</i> , 3 C. P. D. 109; 47 L. J. M. C. 45; 37 L. T. 437; 42 J. P. 280	204
Smout <i>v. Ilhery</i> , 10 M. & W. 1; 12 L. J. Ex. 357; 62 R. R. 510	254, 255
Smyly <i>v. Glasgow and Londonderry Steam Packet Co., Ir. R.</i> 2 C. L. 24; 16 W. R. 483	160
Snark, <i>The</i> , [1900] P. 105; 69 L. J. P. 41; 82 L. T. 42; 48 W. R. 289	243
Snelling <i>v. Huntingfield (Lord)</i> , 1 C. M. & R. 20; 3 L. J. Ex. 232; 40 R. R. 484	16
Snowdon <i>v. Davis</i> , 1 Taunt. 359	263
Soar <i>v. Ashwell</i> , [1893] 2 Q. B. 390; 69 L. T. 585; 42 W. R. 165	70
Somerset <i>v. Hart</i> , 12 Q. B. D. 360; 53 L. J. M. C. 77	203
— <i>v. Wade</i> , [1894] 1 Q. B. 574; 63 L. J. M. C. 126; 70 L. T. 452; 42 W. R. 399; 10 T. L. R. 313	203
Somerville <i>v. Gray</i> , 1 Ct. Sess. Cas. (Third Ser.) 772	153
— <i>v. Hawkins</i> , 10 C. B. 583; 20 L. J. C. P. 131	296, 299
Sommersett's Case, 20 State Trials, 1; Loft, 1	90, 91
Souch <i>v. Strawbridge</i> , 2 C. B. 808; 15 L. J. C. P. 170; 69 R. R. 615	17
South of Ireland Colliery Co. <i>v. Waddle</i> , L. R. 3 C. P. 463; L. R. 4 C. P. 617; 38 L. J. C. P. 338; 17 W. R. 896	12, 13
Southcote <i>v. Stanley</i> , 1 H. & N. 247; 25 L. J. Ex. 339	164, 165

	PAGE
<i>Southee v. Denny</i> , 1 Ex. 196; 17 L. J. Ex. 151	285
<i>Southern v. How</i> , <i>Bridgman</i> , 126; <i>Cro. Jac.</i> 468	141, 142, 182
<i>Southernwood v. Ramsden</i> , <i>Selw. N. P.</i> (13th ed.) 1066	101, 105
<i>South Wales Miners' Federation v. Glamorgan Coal Co.</i> , [1905] A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 593; 21 T. L. R. 441	88, 171
<i>South Yorkshire Railway Co. v. Great Northern Railway Co.</i> , 9 Ex. 55; 22 L. J. Ex. 305	14
<i>Sowdon v. Mills</i> , 30 L. J. Q. B. 175	114
<i>Spaight v. Tedcastle</i> , 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761	153
<i>Spain v. Arnott</i> , 2 Stark. 256; 19 R. R. 715	37, 74, 83, 133
<i>Sparrow v. Paris</i> , 7 H. & N. 594; 31 L. J. Ex. 137; 5 L. T. 799	59
<i>Speake v. Hughes</i> , [1904] 1 K. B. 138; 73 L. J. K. B. 172; 89 L. T. 576	284
<i>Speck v. Phillips</i> , 5 M. & W. 279; 8 L. J. Ex. 249, 277; 52 R. R. 723	77, 117
<i>Speight v. Gosnay</i> , 60 L. J. Q. B. 231; 7 T. L. R. 239	284
— <i>v. Oliveira</i> , 2 Stark. 493; 20 R. R. 728	103
<i>Spicer v. Barnard</i> , 1 E. & E. 874; 28 L. J. M. C. 176; 7 W. R. 467	206, 267
<i>Spill v. Maule</i> , L. R. 4 Ex. 232; 38 L. J. Ex. 138; 20 L. T. 675; 17 W. R. 805	299, 300
<i>Spittle v. Lavender</i> , 2 Brod. & B. 452; 23 R. R. 508	257
<i>Spooner v. Browning</i> , [1898] 1 Q. B. 528; 67 L. J. Q. B. 339; 78 L. T. 98; 46 W. R. 369; 14 T. L. R. 245	178
<i>Spotswood v. Barrow</i> , 5 Ex. 110; 19 L. J. Ex. 226	74, 76
<i>Sproul v. Hemingway</i> , 14 Pick. 71	239
<i>Stables v. Eley</i> , 1 C. & P. 614	235
<i>Stadhart v. Lee</i> , 32 L. J. Q. B. 75; 7 L. T. 850; 11 W. R. 361	122
<i>Stagg v. Elliott</i> , 12 C. B. (N. S.) 373; 31 L. J. C. P. 260; 6 L. T. 433; 10 W. R. 647	192
<i>Stanton's Case</i> , <i>Moore</i> (K. B.) 135	22
<i>Stapleton v. Foreign Vineyard Association</i> , 12 W. R. 976	73
<i>Starkey v. Bank of England</i> , [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; 51 W. R. 513; 19 T. L. R. 312	259
<i>Stead v. Dawber</i> , 10 A. & E. 57; 9 L. J. Q. B. 101; 50 R. R. 327	27
<i>Steel v. Lester</i> , 3 C. P. D. 121; 47 L. J. C. P. 43; 37 L. T. 642; 26 W. R. 212	211
— <i>v. South Eastern Railway Co.</i> , 16 C. B. 550	238
<i>Steele v. Williams</i> , 8 Ex. 625; 22 L. J. Ex. 225	263
<i>Steinman v. Angier Line</i> , [1891] 1 Q. B. 619; 60 L. J. Q. B. 425; 64 L. T. 613; 39 W. R. 392; 7 T. L. R. 398	213
<i>Stephens v. Badcock</i> , 3 B. & Ad. 354; 1 L. J. K. B. 75; 37 R. R. 448	261, 263
— <i>v. Dudbridge Ironworks Co.</i> , [1904] 2 K. B. 225; 73 L. J. K. B. 739; 90 L. T. 838; 52 W. R. 644; 20 T. L. R. 492	7
— <i>v. Elwall</i> , 4 M. & S. 259; 16 R. R. 458	275, 276, 277
— <i>v. London and South Western Railway Co.</i> , 18 Q. B. D. 121; 56 L. J. Q. B. 171; 56 L. T. 226; 35 W. R. 161	212
<i>Stevens v. Benning</i> , 6 D. M. & G. 223; 24 L. J. Ch. 153; 3 W. R. 149	1, 96
— <i>v. Midland Counties Railway Co.</i> , 10 Ex. 352; 23 L. J. Ex. 328	214
— <i>v. Woodward</i> , 6 Q. B. D. 318; 50 L. J. Q. B. 231; 44 L. T. 153; 29 W. R. 506	217
<i>Stevenson v. Mortimer</i> , <i>Cowp.</i> 805	260
— <i>v. Newnham</i> , 13 C. B. 285; 22 L. J. C. P. 110; 17 Jur. 600	87
<i>Stewart v. Beaumont</i> , 4 F. & F. 1034	184
— <i>v. Brooklyn and Crosstown Railroad Co.</i> , 90 N. Y. Rep. 588	221
<i>Stiles v. Cardiff Steam Navigation Co.</i> , 33 L. J. Q. B. 310; 10 L. T. 844; 12 W. R. 1080	209
— <i>v. Ecclestone</i> , [1903] 1 K. B. 544; 72 L. J. K. B. 256; 88 L. T. 294; 51 W. R. 411	59
<i>Stilk v. Myrick</i> , 2 Camp. 317; 11 R. R. 717	118
<i>Stirling v. Maitland</i> , 5 B. & S. 840; 34 L. J. Q. B. 1; 11 L. T. 337; 13 W. R. 76	47
<i>Stock v. Harris</i> , 5 Burr. 2709	280
<i>Stocker v. Brockelbank</i> , 3 Mac. & G. 250; 20 L. J. Ch. 401	110
— <i>v. Wedderburn</i> , 3 K. & J. 393; 26 L. J. Ch. 713; 5 W. R. 671	62
<i>Stokes v. Grissell</i> , 14 C. B. 678; 23 L. J. C. P. 141	54
<i>Stone v. Cartwright</i> , 6 T. R. 411; 3 R. R. 220	233
— <i>v. Cheshire Railroad Corporation</i> , 19 New Hampsh. Rep. 427	238
— <i>v. Marsh</i> , 6 B. & C. 551; 5 L. J. K. B. 201; 30 R. R. 420	339
<i>Storey v. Ashton</i> , L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; 17 W. R. 727	219, 220
<i>Stowell v. Robinson</i> , 3 Bing. N. C. 928; 6 L. J. C. P. 326; 43 R. R. 861	27

	PAGE
Strickland v. Williams, [1899] 1 Q. B. 382; 68 L. J. Q. B. 241; 80 L. T. 4; 15 T. L. R. 131	59
Strode v. Dyson, 1 Smith, 400	185
Stuart v. Bell, [1891] 2 Q. B. 341; 60 L. J. Q. B. 577; 64 L. T. 633; 39 W. R. 612	286, 287, 288, 290, 293, 299
Stubbing v. Heintz, 1 Peake, 47; 3 R. R. 651	193
Stubbs v. Holywell Railway Co., L. R. 2 Ex. 311; 36 L. J. Ex. 166; 15 W. R. 869	134, 138
Stuchbery v. Spencer, 55 L. J. M. C. 141	268
Suart v. Welch, 4 Myl. & Cr. 305	71
Sullivan v. Creed, [1904] 2 Ir. R. 317, 335	226
Summers v. Solomon, 7 E. & B. 879; 26 L. J. Q. B. 301; 5 W. R. 660	179
Summers & Co., Ltd. v. Boyce & Kinmond & Co., Ltd., 97 L. T. 505; 23 T. L. R. 724	68
Sumpter v. Hedges, [1898] 1 Q. B. 673; 67 L. J. Q. B. 545; 78 L. T. 378; 46 W. R. 454	119, 133
Swainson v. North Eastern Railway Co., 3 Ex. D. 341; 47 L. J. Ex. 372; 38 L. T. 201; 26 W. R. 413	149, 153
Swan, <i>Ex parte</i> , 7 C. B. (N. S.) 400; 30 L. J. C. P. 113	178
Sweet v. Benning, 16 C. B. 459; 24 L. J. C. P. 175; 3 W. R. 519	96
— v. Lee, 3 M. & G. 452; 60 R. R. 546	18, 21
Sweeting v. Pearce, 9 C. B. (N. S.) 534; 30 L. J. C. P. 109; 5 L. T. 79; 9 W. R. 343	185
Swift v. Jewsbury, L. R. 9 Q. B. 301, 560; 43 L. J. Q. B. 56; 30 L. T. 31; 22 W. R. 319	174
Sword v. Cameron, 1 St. Sess. Cas. (Sec. Ser.) 493	158
Sykes v. Dixon, 9 A. & E. 693; 8 L. J. Q. B. 102; 48 R. R. 644	18, 89
— v. Giles, 5 M. & W. 645; 9 L. J. Ex. 106; 52 R. R. 870	185
— v. Sykes, L. R. 5 C. P. 113; 39 L. J. C. P. 179; 22 L. T. 236; 18 W. R. 551	263
Sylvester, <i>Ex parte</i> , 9 B. & C. 61	267
Symmons v. Want, 2 Stark. 371	22
Symonds v. Atkinson, 1 H. & N. 146; 25 L. J. Ex. 313	275

T.

Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 426; 70 L. J. K. B. 905; 85 L. T. 147; 50 W. R. 44	169
Tallis v. Tallis, 1 E. & B. 391; 22 L. J. Q. B. 185	50
Tanner v. Christian, 4 E. & B. 591; 24 L. J. Q. B. 91	257
Tarrant v. Webb, 18 C. B. 797; 25 L. J. C. P. 261; 4 W. R. 640	156
Tarry v. Ashton, 1 Q. B. D. 314; 45 L. J. Q. B. 260; 34 L. T. 97; 24 W. R. 581	242
Tasker v. Shepherd, 6 H. & N. 575; 30 L. J. Ex. 207; 4 L. T. 19; 9 W. R. 476	129
Tassell v. Cooper, 9 C. B. 509	70, 197
Taylor v. Brewer, 1 M. & S. 290; 21 R. R. 831	120
— v. Caldwell, 3 B. & S. 826; 32 L. J. Q. B. 164; 8 L. T. 356; 11 W. R. 726	130, 135
— v. Carr, 30 L. J. M. C. 201; 4 L. T. 414; 9 W. R. 699	132
— v. Hawkins, 16 Q. B. 308; 20 L. J. Q. B. 313	291, 299, 301
— v. Laird, 1 H. & N. 267; 25 L. J. Ex. 329	134
— v. Manchester, Sheffield, and Lincolnshire Railway Co., [1895] 1 Q. B. 134; 64 L. J. Q. B. 6; 71 L. T. 596; 43 W. R. 120; 11 T. L. R. 27	99
— v. Rowan, 7 C. & P. 70; 1 Mood. & Rob. 490	303
Teed v. Beere, 28 L. J. Ch. 782; 7 W. R. 394	70
Temperton v. Russell, [1893] 1 Q. B. 715; 62 L. J. Q. B. 412; 69 L. T. 78; 41 W. R. 565; 9 T. L. R. 393	169
Tendring Hundred Waterworks Co. v. Jones, [1903] 2 Ch. 615; 73 L. J. Ch. 41; 52 W. R. 61; 19 T. L. R. 720	195
Terry v. Hutchinson, L. R. 3 Q. B. 599; 37 L. J. Q. B. 257; 18 L. T. 521; 16 W. R. 932	102, 105
Thetford's Case (Mayor of), 3 Salk. 103; 2 Lord Raym. 848; Holt, 171	9
Thomas v. Edwards, 2 M. & W. 215; 46 R. R. 576	196
— v. Quartermaine, 18 Q. B. D. 685; 56 L. J. Q. B. 340; 57 L. T. 537; 35 W. R. 555	155, 161, 165
— v. Rhymney Railway Co., L. R. 6 Q. B. 266; 40 L. J. Q. B. 89; 24 L. T. 145; 19 W. R. 477	213

	PAGE
Thomas v. Williams, 10 B. & C. 664; 34 R. R. 535	21
— v. Williams, 1 A. & E. 685; 3 L. J. K. B. 202	112, 126
Thompson v. Bell, 10 Ex. 10; 23 L. J. Ex. 321; 2 W. R. 559	179
— v. Gibson, 7 M. & W. 456; 10 L. J. Ex. 330; 56 R. R. 762	274
— v. Havelock, 1 Camp. 527; 10 R. R. 744	92
— v. London County Council, [1899] 1 Q. B. 840; 68 L. J. Q. B. 625; 80 L. T. 512; 47 W. R. 433	259
— v. Nye, 16 Q. B. 175; 20 L. J. Q. B. 85; 15 Jur. 285	105
— v. Ross, 5 H. & N. 16; 29 L. J. Ex. 1; 1 L. T. 43; 8 W. R. 44	102
Thomson v. Davenport, 9 B. & C. 78; 2 Sm. L. C. (12th ed.) 355; 32 R. R. 578	188, 196, 254
Tborncroft v. Lashmar, 31 L. J. P. M. & A. 150; 6 L. T. 476; 10 W. R. 783	348
Thorne v. Heard, [1895] A. C. 495; 64 L. J. Ch. 652; 73 L. T. 291; 44 W. R. 155; 11 T. L. R. 464	215
— v. Tilbury, 3 H. & N. 534; 27 L. J. Ex. 407	71
Thorogood v. Bryan, 8 C. B. 115; 18 L. J. C. P. 336	231
Thorold v. Smith, 11 Mod. 71	190
Thrupp v. Collett, 26 Beav. 147; 5 Jur. (N. S.) 111	345
Thrusell v. Handyside & Co., 20 Q. B. D. 359; 57 L. J. Q. B. 347; 58 L. T. 344	161
Tibbits v. Tibbits, 19 Ves. 656; Jac. 317; 23 R. R. 79	349
Tidd, <i>In re</i> ; Tidd v. Overell, [1893] 3 Ch. 154; 62 L. J. Ch. 915; 69 L. T. 255; 42 W. R. 25; 9 T. L. R. 550	70
Tiedemann and Ledermann Frères, <i>In re</i> , [1899] 2 Q. B. 66; 68 L. J. Q. B. 852; 81 L. T. 191	176
Tilson v. Warwick Gas Light Co., 4 B. & C. 962; 28 R. R. 529	11
Tobin v. Crawford, 9 M. & W. 716; 12 L. J. Ex. 490; 52 R. R. 701	182
— v. Reg., 16 C. B. (N. S.) 310; 33 L. J. C. P. 199; 10 L. T. 762; 12 W. R. 838	279
Todd v. Kellage, 8 Ex. 151; 22 L. J. Ex. 1	39
— v. Robinson, Ry. & M. 217	178, 189
Tolhurst v. Associated Portland Cement Manufacturers [1900], Ltd., [1902] 2 K. B. 660; [1903] A. C. 414; 71 L. J. K. B. 949; 72 L. J. K. B. 834; 87 L. T. 465; 89 L. T. 196; 51 W. R. 81; 52 W. R. 143; 18 T. L. R. 827; 19 T. L. R. 677	1
Toms v. Hammond, Barnes, 370	38
Toogood v. Spyring, 1 C. M. & R. 181; 3 L. J. Ex. 347; 40 R. R. 523	286, 287, 294, 301
Tope v. Hockin, 7 B. & C. 101	261
Toplis v. Grane, 5 Bing. N. C. 636; 9 L. J. C. P. 180; 50 R. R. 814	141
Toronto Power Co., Ltd. v. Paskwan, [1915] A. C. 734; 84 L. J. P. C. 148; 113 L. T. 353	158
Torrence v. Gibbins, 5 Q. B. 300; 13 L. J. Q. B. 36	102
Totterdell v. Fareham Blue Brick and Tile Co., L. R. 1 C. P. 674; 35 L. J. C. P. 278; 14 W. R. 919	180
Towne v. Campbell, 3 C. B. 921; 16 L. J. C. P. 128; 71 R. R. 529	36
Townsend v. Jarman, 1900] 2 Ch. 698; 69 L. J. Ch. 823; 83 L. T. 366; 49 W. R. 158	57
Townshend v. Windham, 2 Vern. 546	342
Townson v. Wilson, 1 Camp. 396	263
Trueman v. Loder, 11 A. & E. 589; 9 L. J. Q. B. 165; 52 R. R. 451	188, 197
Tuff v. Warman, 5 C. B. (N. S.) 573; 27 L. J. C. P. 322; 5 Jur. (N. S.) 222; 6 W. R. 693	230
Tngman v. Hopkins, 4 M. & G. 389	263
Tullidge v. Wade, 3 Wils. 18	101, 103, 104
Tunney v. Midland Railway Co., L. R. 1 C. P. 291	143, 153
Turberville v. Stampe, 1 Lord Raym. 264; 1 Salk. 13; 1 Comyns' Rep. 32	205, 210
Turnbull v. Wieland, 38 T. L. R. 143	34
Turner v. Goldsmith, [1891] 1 Q. B. 544; 60 L. J. Q. B. 247; 64 L. T. 301; 39 W. R. 547; 7 T. L. R. 233	43, 44
— v. Great Eastern Railway Co., 33 L. T. 431	149
— v. Hockey, 56 L. J. Q. B. 301	276
— v. Mason, 14 M. & W. 112; 14 L. J. Ex. 311; 2 D. & L. 898; 69 R. R. 670	38, 74, 76
— v. Robinson, 6 C. & P. 15; 5 B. & Ad. 789; 2 N. & M. 829; 39 R. R. 650	37, 68, 78, 193
— v. Sawdon & Co., [1901] 2 K. B. 653; 70 L. J. K. B. 897; 85 L. T. 222; 49 W. R. 712; 17 T. L. R. 645	44

	PAGE
Turney v. Bayley, 4 D. J. & Sm. 332; 33 L. J. Ch. 499; 10 L. T. 115; 12 W. R. 633	31
Turpin v. Victoria Palace, Ltd., [1918] 2 K. B. 539; 119 L. T. 405; 34 T. L. R. 548	44

U.

UDELL v. Atherton, 7 H. & N. 172; 30 L. J. Ex. 337; 4 L. T. 797	183, 215
Ultzen v. Nicols, [1894] 1 Q. B. 92; 63 L. J. Q. B. 289; 70 L. T. 140; 42 W. R. 58; 10 T. L. R. 25	245
Underwood & Son v. Barker, [1899] 1 Ch. 300; 68 L. J. Ch. 201; 80 L. T. 306; 47 W. R. 347; 15 T. L. R. 177	49, 55
Union Steamship Co. v. Claridge, [1894] A. C. 185; 63 L. J. P. C. 56; 70 L. T. 177	150, 234
United Service Co., <i>In re</i> ; Johnston's Claim, L. R. 6 Ch. 212; 40 L. J. Ch. 286; 24 L. T. 115; 19 W. R. 457	244
United States v. City Bank of Columbus, 21 How. 356	196
University of London Press, Ltd. v. University Tutorial Press, Ltd., [1916] 2 Ch. 601; 115 L. T. 301; 32 T. L. R. 698	98
"Utopia," S.S. (Owners) v. "Primula," S.S. (Owners), [1893] A. C. 492; 62 L. J. P. C. 118; 1 R. 394; 70 L. T. 47; 7 Asp. M. C. 408 ...	208

V

VALLANCE v. Falle, 13 Q. B. D. 109; 53 L. J. Q. B. 459; 51 L. T. 158; 32 W. R. 769	162, 282
Valpy v. Manley, 1 C. B. 594; 14 L. J. C. P. 204; 68 R. R. 778	263
Van den Eynde v. Ulster Railway Co., Ir. R. 5 C. L. 328	225
Vaughan v. Booth, 16 Jurist, 808	344
Vaughton v. Brine, 1 M. & G. 359; 9 L. J. C. P. 326; 56 R. R. 379	24
— v. London and North Western Railway Co., L. R. 9 Ex. 93; 43 L. J. Ex. 75; 30 L. T. 119; 22 W. R. 336	212
Venables v. Smith, 2 Q. B. D. 279; 46 L. J. Q. B. 470; 36 L. T. 509; 25 W. R. 584	34, 211, 221
Vernon v. Watson, [1891] 2 Q. B. 288; 60 L. J. Q. B. 472; 64 L. T. 728 39 W. R. 520; 7 T. L. R. 534	339
Verrall v. Robinson, 2 C. M. & R. 495; 5 Tyrw. 1069; 41 R. R. 780	278
Verry v. Watkins, 7 C. & P. 308	105
Vibert v. Eastern Telegraph Co., 1 Cab. & E. 17	41
Vickery v. Great Eastern Railway Co., 79 L. T. 121; 14 T. L. R. 562	142
Vine, <i>Ex parte</i> , Wilson, <i>In re</i> , 8 Ch. D. 364; 47 L. J., Bank. 116; 38 L. T. 730; 26 W. R. 582	101
Vollans v. Fletcher, 1 Ex. 20; 16 L. J. Ex. 173; 74 R. R. 580	24
Vrede, The, 30 L. J. P. M. & A. 209; Lush. 322	119

W.

WADLING v. Oliphant, 1 Q. B. D. 145; 45 L. J. Q. B. 173; 33 L. T. 837; 24 W. R. 246	14, 113
Wain v. Warlters, 5 East, 10; 1 Sm. L. C. 323; 7 R. R. 645	18
Waite v. North Eastern Railway Co., E. B. & E. 719; 28 L. J. Q. B. 258 ...	281
Wakefield v. Newbon, 6 Q. B. 276; 13 L. J. Q. B. 258; 66 R. R. 379	263
Wakelin v. London and South Western Railway Co., 12 App. Cas. 41; 56 L. J. Q. B. 229; 55 L. T. 709; 35 W. R. 141	162, 213, 229
Waldock v. Winfield, [1901] 2 K. B. 596; 70 L. J. K. B. 925; 85 L. T. 202; 17 T. L. R. 661	234
Walker v. British Guarantee Association, 18 Q. B. 277; 21 L. J. Q. B. 257 ...	67
— v. Great Western Railway Co., L. R. 2 Ex. 228; 36 L. J. Ex. 123; 16 L. T. 327; 15 W. R. 769	188
— v. Hirsch, 27 Ch. D. 461; 54 L. J. Ch. 315; 51 L. T. 581; 32 W. R. 992	30
— v. Mills, 2 Br. & B. 1	267

	PAGE
Waller v. Loch, 7 Q. B. D. 619; 51 L. J. Q. B. 274; 45 L. T. 242; 30 W. R. 18	288, 300
— v. South Eastern Railway Co., 2 H. & C. 102; 32 L. J. Ex. 206; 8 L. T. 325; 11 W. R. 731	145, 153
Wallis v. Day, 2 M. & W. 273; 6 L. J. Ex. 92; 46 R. R. 602	60
— v. Littell, 11 C. B. (N. S.) 369; 31 L. J. C. P. 100; 5 L. T. 489; 10 W. R. 192	25
— v. Smith, 21 Ch. D. 243; 52 L. J. Ch. 145; 47 L. T. 389; 31 W. R. 214	59
— v. Warren, 4 Ex. 361; 7 D. & L. 58; 18 L. J. Ex. 449	113
Walsh v. Walley, L. R. 9 Q. B. 367; 43 L. J. Q. B. 102; 22 W. R. 571	132
Walter, <i>Ex parte</i> ; Heath, <i>In re</i> , 15 Eq. 412; 42 L. J. Bank. 49; 21 W. R. 523	127
— v. Everard, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738; 65 L. T. 443; 39 W. R. 676; 7 T. L. R. 469	5
Wanstall v. Pooley, 6 Cl. & F. 910, n.; 49 R. R. 266	233
Warburton v. Co-operative Wholesale Society, Ltd., [1917] 1 K. B. 663; 86 L. J. K. B. 529; 116 L. T. 107; 33 T. L. R. 124	84
— v. Heyworth, 6 Q. B. D. 1; 50 L. J. Q. B. 137; 43 L. T. 461; 29 W. R. 91	36
Ward v. Byrne, 5 M. & W. 548; 9 L. J. Ex. 14; 52 R. R. 827	53
— v. Evans, 2 Salk. 442; 6 Mod. 36; 2 Lord Raym. 928	190, 191
— v. Lee, 7 E. & B. 426; 26 L. J. Q. B. 142; 5 W. R. 403	281
— v. Lloyd, 6 M. & G. 785; 13 L. J. C. P. 5; 64 R. R. 847	340
— v. London General Omnibus Co., 42 L. J. C. P. 265; 28 L. T. 850	221
Warner v. Wellington, 25 L. J. Ch. 662; 3 Drew. 523; 4 W. R. 531	18
Warrington v. Windhill Industrial Co-operative Society, 118 L. T. 505; 82 J. P. 149; 16 L. G. R. 456	204
Waters v. Brogden, 1 Y. & J. 457	191, 195
Watling v. Oastler, L. R. 6 Ex. 73; 40 L. J. Ex. 43; 23 L. T. 815; 19 W. R. 388	160
Watson v. Christie, 2 B. & P. 224; 5 R. R. 579	72
— v. Murrell, 1 C. & P. 307; 28 R. R. 779	257
— v. Threlkeld, 2 Esp. 637; 5 R. R. 760	4
— v. White, [1896] 2 Q. B. 9; 65 L. J. Q. B. 492; 74 L. T. 702; 44 W. R. 525; 12 T. L. R. 387	209
Watteau v. Fenwick, [1893] 1 Q. B. 346; 67 L. J. Q. B. 831; 67 L. T. 831; 41 W. R. 222; 9 T. L. R. 133	189
Watts v. Smith, 62 L. T. 453	56
Wayland's, Sir Robert, Case, 3 Salk. 234	178
Weatherston v. Hawkins, 1 T. R. 110; 28 R. R. 248	290
Webb v. East, 5 Ex. D. 108; 49 L. J. Ex. 250; 41 L. T. 715; 28 W. R. 336	288
— v. England, 29 Beav. 44; 30 L. J. Ch. 222; 3 L. T. 574; 9 W. R. 183	111
Weblin v. Ballard, 17 Q. B. D. 122; 55 L. J. Q. B. 395; 54 L. T. 532; 34 W. R. 455	162
Webster v. Dillon, 3 Jur. (N. S.) 432	61
Weeks v. Propert, L. R. 8 C. P. 427; 42 L. J. C. P. 129; 21 W. R. 676	259
Welchman v. Sturgis, 13 Q. B. 552; 18 L. J. Q. B. 211; 78 R. R. 448	131
Wells v. Abrahams, L. R. 7 Q. B. 544; 41 L. J. Q. B. 306; 26 L. T. 433; 20 W. R. 659	100, 339
Wenman v. Ash, 13 C. B. 837; 22 L. J. C. P. 190; 1 W. R. 452	297
Wennall v. Adney, 3 B. & P. 247; 6 R. R. 780	139, 140, 141
Wennhak v. Morgan, 20 Q. B. D. 635; 57 L. J. Q. B. 241; 59 L. T. 28; 36 W. R. 697	286, 303
Wentworth v. Cock, 10 A. & E. 42; 8 L. J. Q. B. 230; 50 R. R. 316	136
— v. Tubb, 1 Y. & C. C. R. 171	7, 8
West London Commercial Bank v. Kitson, 13 Q. B. D. 360; 53 L. J. Q. B. 345; 50 L. T. 656; 32 W. R. 757	259
Westminster Fire Office v. Glasgow Provident Society, 13 App. Cas. 699; 59 L. T. 641	210
West Riding and Grimsby Railway Co. v. Wakefield Local Board, 33 L. J. M. C. 174; 12 W. R. 1076	241
Westwick v. Theodore, L. R. 10 Q. B. 224; 44 L. J. Q. B. 110; 32 L. T. 693; 23 W. R. 620	85
Weyland v. Elkins, Holt, N. P. 227; 1 Starkie, 272	233
Whaley Bridge Printing Co. v. Green, 5 Q. B. D. 109; 49 L. J. Q. B. 326; 41 L. T. 674; 28 W. R. 351	66
Wharton v. Mackenzie, 5 Q. B. 612; 13 L. J. Q. B. 130; 64 R. R. 584	5

	PAGE
Whatman <i>v.</i> Pearson, L. R. 3 C. P. 422; 37 L. J. C. P. 156; 18 L. T. 290; 16 W. R. 649	221
Wheatley <i>v.</i> Patrick, 2 M. & W. 650; 6 L. J. Ex. 193; 46 R. R. 731	219
Whincup <i>v.</i> Hughes, L. R. 6 C. P. 78; 40 L. J. C. P. 104; 24 L. T. 76; 19 W. R. 439	131
Whitbourne <i>v.</i> Williams, [1901] 2 K. B. 722; 70 L. J. K. B. 933; 85 L. T. 271; 17 T. L. R. 707	109
White <i>v.</i> Bartlett, 9 Bing. 378; 2 L. J. C. P. 43; 35 R. R. 562	70, 261
— <i>v.</i> Bayley, 10 C. B. (N. S.) 227; 30 L. J. C. P. 253	32, 33
— <i>v.</i> Boulton, 1 Peake, 81; 3 R. R. 657	213
— <i>v.</i> Crisp, 10 Ex. 312; 23 L. J. Ex. 317	208
— <i>v.</i> France, 2 C. P. D. 308; 46 L. J. C. P. 823; 25 W. R. 878	172
— <i>v.</i> Jameson, 18 Eq. 303; 22 W. R. 761	248
— <i>v.</i> Spettigue, 13 M. & W. 603; 14 L. J. Ex. 99; 9 Jur. 70; 67 R. R. 753 99,	339
Whitechurch (George), Ltd. <i>v.</i> Cavanagh, [1902] A. C. 117; 71 L. J. K. B. 400; 85 L. T. 349; 50 W. R. 218	229
Whitehead <i>v.</i> Reader, [1901] 2 K. B. 48; 70 L. J. K. B. 546; 84 L. T. 514; 49 W. R. 562; 17 T. L. R. 387	142
— <i>v.</i> Tuckett, 15 East, 400; 13 R. R. 509	175, 189
Whiteley <i>v.</i> Adams, 15 C. B. (N. S.) 392; 33 L. J. C. P. 89; 9 L. T. 483; 12 W. R. 153	286, 287, 294
— <i>v.</i> Pepper, 2 Q. B. D. 276; 46 L. J. Q. B. 436; 36 L. T. 588; 25 W. R. 607	210, 241
Whitfield <i>v.</i> Lord Le Despencer, 2 Cowp. 754	251, 280
— <i>v.</i> South Eastern Railway Co., E. B. & E. 115; 27 L. J. Q. B. 229; 6 W. R. 545	214
Whitley Partners, Limited, <i>In re</i> , 32 Ch. D. 337; 55 L. J. Ch. 540; 54 L. T. 912; 34 W. R. 505	174
Whitmore <i>v.</i> Farley, 43 L. T. 192; 28 W. R. 908	339
Whittaker <i>v.</i> London County Council, [1915] 2 K. B. 676; 113 L. T. 544; 13 L. G. R. 950; 79 J. P. 437; 31 T. L. R. 412	162
Whittle <i>v.</i> Frankland, 2 B. & S. 49; 31 L. J. M. C. 81; 5 L. T. 639	18, 47
Whitwood Chemical Co. <i>v.</i> Hardman, [1891] 2 Ch. 416; 60 L. J. Ch. 428; 64 L. T. 716; 39 W. R. 433; 7 T. L. R. 325	60, 61, 62
Wickham <i>v.</i> Gattrell, 23 L. J. Ch. 783; 2 W. R. 673	339
Wicks, <i>Ex parte</i> , 17 Ch. D. 70; 50 L. J. Ch. 620; 44 L. T. 836; 29 W. R. 525	15
Wiggett <i>v.</i> Fox, 11 Ex. 832; 25 L. J. Ex. 188	149
Wigglesworth <i>v.</i> Dallison, Dougl. 201; 1 Sm. L. C. 545	27
Wigmore <i>v.</i> Jay, 5 Ex. 354; 19 L. J. Ex. 300	148
Wilkin <i>v.</i> Reed, 15 C. B. 192; 23 L. J. C. P. 193; 2 W. R. 556	233
Wilkins (Fred) & Bros., Ltd. <i>v.</i> Weaver, [1915] 2 Ch. 322; 84 L. J. Ch. 929 ...	90
Wilkinson <i>v.</i> Evans, L. R. 1 C. P. 407; 35 L. J. C. P. 224; 14 W. R. 963 ...	18
— <i>v.</i> Gaston, 9 Q. B. 137; 15 L. J. Q. B. 339; 72 R. R. 198	113
Willets <i>v.</i> Green, 3 C. & K. 59	74
Willet <i>v.</i> Boote, 6 H. & N. 26; 30 L. J. M. C. 6; 3 L. T. 276	233
Williams <i>v.</i> Birmingham Battery, &c., Co., [1899] 2 Q. B. 338; 68 L. J. Q. B. 918; 81 L. T. 62; 47 W. R. 680; 15 T. L. R. 468	158, 160
— <i>v.</i> Byrne, 7 A. & E. 177; 6 L. J. K. B. 239; 45 R. R. 703	36
— <i>v.</i> Clough, 3 H. & N. 258; 27 L. J. Ex. 325	159
— <i>v.</i> Corbet, 8 Sim. 349; 42 R. R. 200	349
— <i>v.</i> Cranston, 2 Stark. 82; 19 R. R. 681	274
— <i>v.</i> Everett, 14 East, 582; 13 R. R. 315	265
— <i>v.</i> Great Western Railway Co., 10 Ex. 15	212
— <i>v.</i> Hedley, 8 East, 378; 9 R. R. 473	262
— <i>v.</i> Jones, 3 H. & C. 602; 33 L. J. Ex. 297; 13 L. T. 300; 13 W. R. 1023	210
— <i>v.</i> Linotype and Machinery, Ltd., 84 L. J. K. B. 1620; 112 L. T. 558	150
— <i>v.</i> Pigott, 2 Ex. 201; 17 L. J. Ex. 196	189
— <i>v.</i> Stott, 1 Cr. & M. 675; 3 L. J. Ex. 110; 38 R. R. 724	324, 328
Williamson <i>v.</i> Barton, 7 H. & N. 899; 31 L. J. Ex. 171; 5 L. T. 800; 10 W. R. 321	254
— <i>v.</i> Freer, L. R. 9 C. P. 393; 43 L. J. C. P. 161; 30 L. T. 332; 22 W. R. 878	286, 301
— <i>v.</i> Hine, [1891] 1 Ch. 390; 60 L. J. Ch. 123; 63 L. T. 632; 39 W. R. 239; 7 T. L. R. 130	65
— <i>v.</i> Norris, [1899] 1 Q. B. 7; 68 L. J. Q. B. 31; 79 L. T. 415; 47 W. R. 94; 15 T. L. R. 18	268
— <i>v.</i> Taylor, 5 Q. B. 175; 13 L. J. Q. B. 81	19, 44

	PAGE
Willis v. Child, 13 Beav. 117, 454; 20 L. J. Ch. 113	110
Willson v. Love, [1896] 1 Q. B. 626; 65 L. J. Q. B. 474; 74 L. T. 580; 44 W. R. 450	59
Wilmott v. Smith, Moo. & M. 238; 31 R. R. 732	181
Wilson v. Anderton, 1 B. & Ad. 450; 35 R. R. 348	278
— v. Curzou (Viscount), 15 M. & W. 532; 16 L. J. Ex. 122	123
— v. Glossop, 20 Q. B. D. 354; 57 L. J. Q. B. 161; 58 L. T. 707; 36 W. R. 296	4
— v. Hodgson's Kingston Brewery Co., Ltd., and Burgmaier, 85 L. J. K. B. 270; 113 L. T. 1112; 80 J. P. 39; 32 T. L. R. 60	241, 243
— v. Merry, L. R. 1 H. L. Sc. 326; 19 L. T. 30	154, 156
— v. Peto, 6 Moore, C. P. 47	274
— v. Rankin, 34 L. J. Q. B. 62; 35 L. J. Q. B. 87; L. R. 1 Q. B. 162; 13 L. T. 564; 14 W. R. 198	229
— v. Robinson, 7 Q. B. 68; 14 L. J. Q. B. 196; 68 R. R. 411	296
— v. Stewart, 32 L. J. M. C. 198; 8 L. T. 277; 11 W. R. 640	198, 269
— v. West Hartlepool Harbour and Railway Co., 3 D. J. & S. 475; 34 L. J. Ch. 241; 11 L. T. 692	185
— v. Zulueta, 14 Q. B. 405; 19 L. J. Q. B. 49	24
Windsor, <i>In re</i> , 34 L. J. M. C. 163; 12 L. T. 307; 13 W. R. 653; 10 Cox, C. C. 118	333
Winkfield v. Packington, 2 C. & P. 599	179
Winsmore v. Greenbank, Willes, 577	88
Winstone v. Linn, 1 B. & C. 460; 25 R. R. 455	85
Winter v. Banks, 84 L. T. 504; 49 W. R. 574	276
Winterbottom v. Wright, 10 M. & W. 109; 11 L. J. Ex. 415; 62 R. R. 534 ...	251
Wise v. Wilson, 1 C. & K. 662; 70 R. R. 814	77, 80, 85
Wolstenholme v. Ariss, [1920] 2 Ch. 403; 89 L. J. Ch. 395	169
Wolverhampton and Walsall Railway Co. v. London and North Western Rail- way Co., 16 Eq. 433; 43 L. J. Ch. 131	61
Wood v. Benson, 2 Cr. & J. 95; 1 L. J. Ex. 18; 37 R. R. 635	21
— v. Fenwick, 10 M. & W. 195; 11 L. J. M. C. 127	6
Woodbridge & Sons v. Bellamy, [1911] 1 Ch. 326; 80 L. J. Ch. 265; 103 L. T. 852; 55 S. J. 204	55
Woodgate v. Knatchbull, 2 T. R. 148; 1 R. R. 449	198
Woodhead v. Gartness Mineral Co., 4 Rettie, 469	149
Woodin v. Burford, 2 Cr. & M. 391; 3 L. J. Ex. 75; 4 Tyrw. 264; 39 R. R. 802	183, 185
Woodley v. Coventry, 2 H. & C. 164; 32 L. J. Ex. 185; 8 L. T. 249; 11 W. R. 599	180
Woodward v. Lander, 6 C. & P. 548; 40 R. R. 816	298
Worthington v. Sudlow, 2 B. & S. 508; 31 L. J. Q. B. 130; 8 Jur. 668; 6 L. T. 283; 10 W. R. 621	122
Wright v. Child, 4 H. & C. 529; L. R. 1 Ex. 358; 35 L. J. Ex. 209; 15 L. T. 141	209
— v. Glyn, [1902] 1 K. B. 745; 71 L. J. K. B. 497; 86 L. T. 373; 50 W. R. 402; 18 T. L. R. 404	176, 194
— v. Leonard, 11 C. B. (N. S.) 258; 30 L. J. C. P. 365; 5 L. T. 110 ...	5
— v. London and North Western Railway Co., 1 Q. B. D. 252; 45 L. J. Q. B. 570; 33 L. T. 830	150
— v. London General Omnibus Co., 2 Q. B. D. 271; 46 L. J. Q. B. 429; 36 L. T. 590; 25 W. R. 647	210
— v. Marquis of Zetland, [1908] 1 K. B. 63; 77 L. J. K. B. 152; 97 L. T. 867; 24 T. L. R. 48	110
— v. Moorhouse, Cro. Eliz. 358	284
— v. Roxburgh, 2 Ct. Sess. Cas. (Third Ser.) 748	165
— v. Wilcox, 19 Wendell's Rep. 343	229
— v. Woodgate, 2 C. M. & R. 573; 41 R. R. 788	286, 296, 300
Wyatt v. Gore, Holt, N. P. 299	298
— v. Metropolitan Board of Works, 11 C. B. (N. S.) 744; 31 L. J. C. P. 217	11

Y.

YARBOROUGH v. Bank of England, 16 East, 6; 14 R. R. 272	213
Yarmouth v. France, 19 Q. B. D. 647; 57 L. J. Q. B. 7; 36 W. R. 281	161
Yeomans v. Legh, 2 M. & W. 419	69

	PAGE
Yonge v. Toynbee, [1910] 1 K. B. 215; 79 L. J. K. B. 208; 102 L. T. 57; 26 T. L. R. 211	254
Young, <i>In re</i> ; Jones, <i>Ex parte</i> , [1896] 2 Q. B. 484; 65 L. J. Q. B. 681; 75 L. T. 278; 45 W. R. 96; 12 T. L. R. 633	31
— v. Chalkley, 16 L. T. 286; 15 W. R. 743	60
— v. Hoffman Manufacturing Co., Ltd., [1907] 2 K. B. 646; 76 L. J. K. B. 993; 97 L. T. 230; 23 T. L. R. 671	154, 155, 156
— v. Naval, Military and Civil Service Co-operative Society, [1905] 1 K. B. 687; 74 L. J. K. B. 302; 92 L. T. 458; 53 W. R. 447; 21 T. L. R. 293	118
— v. Royal Leamington Spa (Mayor of), 8 App. Cas. 517; 52 L. J. Q. B. 716; 49 L. T. 1; 31 W. R. 925	10

Z.

ZOUCH v. Parsons, 3 Burr. 1794	5
--------------------------------------	---

CORRIGENDA.

- Page 8, note (e), after "*Beckham v. Drake*," insert "2 H. L. C. 579."
 Page 38, note (c), for "1 K. B." read "2 K. B."
 Page 50, note (i), for "688" read "45."
 Page 55, note (q), after "*Johnstone-White*" insert "[1907] 1 Ch. 322."
 Page 85, note (h), after "88 L. T." insert "288."
 Page 101, note (e), for "1115" read "1066."
 Page 105, note (x), after "2 Selw. N. P." insert "1066."
 Page 110, note (h), last line, for "1903" read "1908."
 Page 113, note (u), add "13 C. B. 495."
 Page 180, note (p), for "668" read "897."
 Page 187, note (g), for "320" read "294."
 Page 221, note (d), for "2 Q. B." read "2 Q. B. D."
 Page 339, note (h), for "1 B. N. C." read "1 Bing. N. C."
 Page 339, note (m), for "369" read "412."

A TREATISE

ON

THE LAW OF MASTER AND SERVANT.

CHAPTER I.

THE PARTIES TO THE CONTRACT.

Generally.

THE relationship of master and servant arises out of a contract, although in many cases the rights and duties existing between master and servant when that relationship has been created depend on statute. Usually the foundations of the contract are personal considerations, and he who has thus undertaken the personal fulfilment of certain duties to another is not entitled, apart from any special agreement to the contrary, to perform them by deputy, nor has the other the right to assign to a stranger duties which under the contract are owed to him personally (a). Thus these contracts, in respect of their incapacity of being assigned by the master without the consent of the servant, form, with other contracts founded on personal considerations, such as those between principal and agent, and between author and publisher (b), exceptions to the general assignability of contracts. Unexecuted contracts for personal service are neither assignable by deed nor do they vest in the servant's trustee in bankruptcy (c).

(a) The reason why contracts involving personal qualifications in the contractor are said not to be assignable is that the assignor "cannot vouch the capacity of another to perform that which the other party to the contract might, however unreasonably, insist was what alone he undertook to pay for, viz., work to be executed by the party himself," per Collins, M.R., in *Tolhurst v. Associated Portland Cement Manufacturers* (1900) *Ltd.*, [1902] 2 K. B. 660, 669.

(b) *Stevens v. Benning*, 6 De G. M. & G. 223; *Hole v. Bradbury*, 12 Ch. D. 886; *Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21. In the last-named case the publishers were a limited company, but it was held that their contract with an author was of so personal a nature that they could not assign their rights under it, without the author's consent.

(c) *Bailey v. Thurston & Co.*, [1903] 1 K. B. 137.

Contracts of hiring and service, like the generality of contracts, may be entered into by any one, either as master or servant. But as certain classes of persons are subject to special rules with regard to their capacity to bind themselves by contract, it will be well to refer briefly to the positions held by such persons (*d*).

Married Women.

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which came into force on 1st January, 1883, it is enacted:

"Sect. 1. (1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

"(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

[Sub-sects. (3) and (4) were repealed by the Married Women's Property Act, 1893, *post*.]

"2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any *wages*, *earnings*, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

"5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession,

(*d*) Except in the case of apprentices (Poor Relief Act, 1691, 3 Will. & Mary, c. 11, and Apprentices (Settlement) Act, 1757, 31 Geo. II. c. 11) no settlement can be gained by hiring and service since August 14th, 1834 (Poor Law Amendment Act, 1834, 4 & 5 Will. IV. c. 76, s. 64).

reversion, or remainder, shall accrue after the commencement of this Act, including any *wages*, *earnings*, money, and property so gained or acquired by her as aforesaid."

The Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), repealed sub-sects. (3) and (4) of sect. 1 of the Married Women's Property Act, 1882, and provided as follows:

"Sect. 1. Every contract hereafter entered into by a married woman otherwise than as agent,

"(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

"(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to;

"Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

The result of these enactments is that since 1893 every contract entered into by a married woman, otherwise than as an agent, will be entered into by her as if she were a *feme sole*, and will bind her personally; and a judgment against her, though enforceable only against her separate estate not subject to a restraint on anticipation, is precisely the same as a judgment against an unmarried woman (*e*).

The liability of a husband upon a contract entered into by his wife when they are living together depends entirely upon the question whether the wife was his agent and had authority from him to enter into the contract. The fact of marriage only does not make a wife the agent in law of her husband, except in the particular case of necessity which may arise when the husband has compelled his wife to live apart from him without properly providing for her (*f*). The authority given by the husband to the wife to make contracts on his behalf may be express or implied from circumstances. Whether the circumstances are such as to raise the implication of his having given such authority is a question of fact (*g*), and if there is no reasonable evidence upon which the jury can act, the Judge is justified in withdrawing the case from the jury and giving judgment for the defendant (*h*).

(*e*) *Pelton Brothers v. Harrison*, [1892] 1 Q. B. 118.

(*f*) *Manby v. Scott*, 2 Smith's L. C. 446; *Eastland v. Burchell*, 3 Q. B. D. 432; *Debenham v. Mellon*, 6 App. Cas. 24.

(*g*) *Debenham v. Mellon*, 6 App. Cas. 24.

(*h*) *Phillipson v. Hayter*, L. R. 6 C. P. 38.

From the circumstance of cohabitation (i), where the husband is keeping up a household establishment, the wife may be presumed, as manager of the household, to have the authority of her husband to pledge his credit to a reasonable extent for such matters as the hiring of domestic servants necessary or suitable to the style in which he chooses to live (k). If the husband has done nothing by way of holding out his wife as his authorised agent for any particular purpose, and has not ratified a contract she has made on his behalf, the presumption arising from cohabitation may be rebutted by showing that he had expressly forbidden his wife to hire the servant (l), or by showing that he had allowed and paid his wife an adequate sum for the payment of necessary expenses (m).

Where the husband and wife do not cohabit, there is no presumption that the wife has authority to bind her husband, even for necessities suitable to her degree in life; it is for the plaintiff to show that under the circumstances of the separation, or from the conduct of the husband, she had such authority (n). If she leave her husband without cause and without his consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere (o). If she is turned away by her husband without justifiable cause, and she is without reasonable means of supporting herself, the husband is bound by any contract she makes for necessities suitable to her degree and estate (p), including the hiring of servants (q).

A married woman, professing to make a contract on behalf of her husband, but having no express or implied authority from him to do so, would be under the same liability as any other agent making a contract on behalf of a principal without his authority (r). In such

(i) *Etherington v. Parrot*, 1 Salk. 118; *Jewsbury v. Newbold*, 26 L. J. Ex. 247; *Manby v. Scott*, 2 Smith's L. C. 446. This presumption of agency arising from cohabitation is not confined to the case of a lawful wife; it extends to the case of a woman with whom the defendant cohabits, although not his wife: *Watson v. Threlkeld*, 2 Esp. 637; *Blades v. Free*, 9 B. & C. 167.

(k) *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Phillipson v. Hayter*, L. R. 6 C. P. 38. The supply of necessities for the household on the orders of the wife is not evidence that she and her husband are jointly liable: *Morel v. Earl of Westmoreland*, [1904] A. C. 11. A girl living with her father and mother, and doing household work, was held to be in the service of her father, not in the service of her father and mother jointly: *Hamilton v. Long*, [1903] 2 I. R. 407.

(l) *Etherington v. Parrot*, 1 Salk. 118; *Jolly v. Rees*, 15 C. B. (N. S.) 628.

(m) *Debenham v. Mellon*, 6 App. Cas. 24. It is immaterial whether or not the plaintiff was aware of this allowance being paid; he could only succeed by showing some facts which are evidence of an ostensible authority given by the husband to the wife: *Morel v. Earl of Westmoreland*, [1903] 1 K. B. 64; [1904] A. C. 11.

(n) *Mainwaring v. Leslie*, M. & M. 18; *Ozard v. Darnford*, Selw. N. P. 294; *Clifford v. Laton*, M. & M. 101.

(o) *Eastland v. Burchell*, 3 Q. B. D. 432.

(p) *Mizen v. Pick*, 3 M. & W. 481; *Wilson v. Glossop*, 20 Q. B. D. 354.

(q) *Bazeley v. Forder*, L. R. 3 Q. B. 559, 563.

(r) See, post, p. 254 et seq., on the servant's liability to third persons in cases of contract.

cases the remedy is by an action against the agent for breach of an implied warranty of authority. Although a husband be not liable on his wife's contract, he is liable jointly with her for any fraud or other tort committed by her during the coverture, unless it is directly connected with the contract, and is the means of effecting or inducing it, and is part of the same transaction (*s*). So where the tort arises out of and is inseparable from a contract of employment made between the servant and the wife, the husband is not liable (*t*).

Infants.

Although infants labour under a general incapacity to enter into *absolutely* binding contracts with other persons (*u*), yet they may make some contracts which will be binding upon them, such as contracts for their benefit (*x*), and in particular infants may make binding contracts for necessities (*y*).

What are necessities is a mixed question of law and fact (*z*), and will be decided by the Court and jury taking into consideration such things as the station in life of the infant (*a*), and whether he was already sufficiently supplied with similar goods (*b*).

Livery for the servants of an infant, who was a captain in the Army, has been held to come within the description of necessities, and the infant was held liable to pay for it (*c*). Similar principles would apply to a claim for wages (*d*).

Education (*e*) is a necessary for an infant, as also is instruction in a trade (*f*). What particular kind of education is necessary is a question for the jury, having regard to the infant's condition in life (*g*).

A contract of apprenticeship is generally to be regarded as for the benefit of an infant, and, therefore, he may make a legal binding contract of apprenticeship (*h*). If he could not do so, he could not

(*s*) *Wright v. Leonard*, 11 C. B. (N. S.) 258; *Earle v. Kingscote*, [1900] 2 Ch. 585.

(*t*) *Cole v. De Trafford*, [1917] 1 K. B. 911.

(*u*) Bac., Abr. tit. "Infancy," I. *Ryder v. Wombwell*, L. R. 4 Ex. 32, 38.

(*x*) *Maddon v. White*, 2 T. R. 159; *R. v. Shinfield (Inhabitants)*, 14 East, 541; *Zouch v. Parsons*, 3 Burr. 1794, 1801.

(*y*) Bac. Abr. tit. "Infancy," I. 1; *Ryder v. Wombwell*, L. R. 4 Ex. 32, 38.

(*z*) *Wharton v. Mackenzie*, 5 Q. B. 612.

(*a*) *Peters v. Fleming*, 6 M. & W. 42; *Wharton v. Mackenzie*, *ubi supra*; *Chapple v. Cooper*, 13 M. & W. 252.

(*b*) *Barnes & Co. v. Toye*, 13 Q. B. D. 410; *Johnstone v. Marks*, 19 Q. B. D. 509.

(*c*) *Hands v. Slaney*, 8 T. R. 578. (*d*) *Chapple v. Cooper*, 13 M. & W. 252.

(*e*) *Pickering v. Gunning*, Palm. 528; *Chapple v. Cooper*, *supra*.

(*f*) *Walter v. Everard*, [1891] 2 Q. B. 369; *Chapple v. Cooper*, *supra*; *Roberts v. Gray*, [1913] 1 K. B. 520 (contract to go on professional billiard tour held to be for instruction and for infant's benefit).

(*g*) *Walter v. Everard*, *supra*.

(*h*) *R. v. Arundel (Inhabitants)*, 5 M. & S. 257; *Cooper v. Simmons*, 7 H. & N. 707; *De Francesco v. Barnum*, 45 Ch. D. 430. As to the execution of the apprenticeship deed, see Chap. II., *post*. An increased burden on the father by reason of a rise in the cost of living has been held not to make an apprenticeship deed cease to be for his child's benefit, and the deed was enforced: *Dillingham v. Harrison*, [1917] W. N. 305. An infant may enter into a contract of apprenticeship in the capacity of master: *R. v. St. Petrox (Inhabitants)*, 4 T. R. 196.

be bound at all, for a father has no common law authority to bind his infant son an apprentice without his consent (*i*).

A contract of hiring and service may be beneficial to an infant, and would, generally speaking, be binding upon him, and may be made even with his own father (*k*) or mother (*l*). Such a contract would subject him to the statutable regulations applicable to masters and servants (*m*). Also it would give him a right of action for wages earned (*n*). For if an infant of five years of age, or other person who is *non potens in corpore*, be retained and serve in the best manner he can, his master must pay him his wages (*o*).

Difficult questions sometimes arise whether or not an infant's agreement of hiring and service or apprenticeship is so beneficial as to be binding upon him. It is impossible to frame a deed between a master and an apprentice in which some stipulations are not in favour of the master. When any stipulation is relied upon by the infant as being unfair to him, it is the duty of the Court to decide on the construction of the whole contract, and then to say whether, as a whole, it is clearly and manifestly for the benefit of the infant. The question is whether the agreement taken as a whole is so much to the detriment of the infant as to render it unfair that he should be bound by his agreement. If there is any stipulation such as to make the whole contract an unfair one, then the whole contract is void (*p*).

A contract of hiring and service for wages has been considered beneficial to, and binding upon, an infant, although it contained clauses for referring disputes to arbitration, and for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages (*q*). But it has been held that a contract of service or apprenticeship by an infant binding himself to serve during a certain time for wages, but enabling the master to stop the work whenever he chose, and retain the wages during the stoppage, is wholly void, as not being beneficial to the infant (*r*).

But an agreement by which it was provided that the apprentice should not be bound to serve on such days as the master's business should be at a standstill through accident beyond the control of the

(*i*) *R. v. Arnesby (Inhabitants)*, 3 B. & Ald. 584. As to suing on the contract of apprenticeship, see p. 71, *post*.

(*k*) *R. v. Chillesford (Inhabitants)*, 4 B. & C. 94.

(*l*) *Gilbert v. Schwenck*, 14 M. & W. 488.

(*m*) *R. v. Chillesford (Inhabitants)*, *ubi supra*; *Wood v. Fenwick*, 10 M. & W. 195, 204.

(*n*) *R. v. Chillesford (Inhabitants)*, 4 B. & C. 94, 101; *Wood v. Fenwick*, 10 M. & W. 195, 204.

(*o*) Dalt. Just. Ch. 58; Bro. tit. "Labour," 46; Bac. Abr. tit. "Master and Servant"; *Phillips v. Jones*, 1 A. & E. 333.

(*p*) *Corn v. Matthews*, [1893] 1 Q. B. 310; *Flower v. London and North Western Railway Co.*, [1894] 2 Q. B. 65; *Clements v. London and North Western Railway Co.*, [1894] 2 Q. B. 482; *Roberts v. Gray*, [1913] 1 K. B. 520.

(*q*) *Wood v. Fenwick*, 10 M. & W. 195.

(*r*) *R. v. Lord*, 12 Q. B. 757; *Meakin v. Morris*, 12 Q. B. D. 352; *Corn v. Matthews*, [1893] 1 Q. B. 310.

master, and that on such days the master should not be liable to pay the apprentice any wages, was held not to be an unfair one for the infant (s).

Nor was an agreement considered void on the face of it by which it was provided that the employers might terminate it and discharge the infant from their service on fourteen days' notice, should they cease to carry on business or find it necessary to reduce the operations of their works, either temporarily or permanently, in consequence of being unable to obtain materials or in consequence of any accident or strikes of workmen, or from any cause beyond their control (t). The question was whether such provisions were common to labour contracts, or were at the time a reasonable measure of protection for the master, and whether the wages were fair.

A restrictive covenant containing the only terms on which an infant can reasonably expect to get employment, as not to solicit customers or not to practise within a certain district after the termination of his service, is enforceable (u), and there is, in this respect, no distinction between a contract of service and a contract of apprenticeship (x). So an agreement in consideration of being employed as a milk carrier not to compete in business within a radius of five miles for two years after leaving (y), was held to be fair to the infant (z).

The County Courts Act, 1888, as amended by the County Courts Act, 1903, provides by sect. 96 that, "it shall be lawful for any person under the age of twenty-one years to prosecute any action in the Court for any sum of money, not greater than one hundred pounds, which may be due to him for wages, or piecework, or for work as a servant, in the same manner as if he were of full age."

Lunatics.

The position of a lunatic or person of unsound mind is considered in general to bear some analogy to that of an infant in regard to his liability upon contracts (a). For although, strictly speaking, a person of unsound mind is incompetent to contract (b), yet there can be no

(s) *Green v. Thompson*, [1899] 2 Q. B. 1.

(t) *Leslie v. Fitzpatrick*, 3 Q. B. D. 229.

(u) *Bromley v. Smith*, [1909] 2 K. B. 235.

(x) *Gadd v. Thompson*, [1911] 1 K. B. 304.

(y) *Evans v. Ware*, [1892] 3 Ch. 502.

(z) In *De Francesco v. Barnum*, 45 Ch. D. 430, there were "stipulations of an extraordinary and an unusual character, which throw, or appear to throw, an inordinate power into the hands of the master without any correlative obligation" (per Fry, L.J.). The instrument of apprenticeship was therefore not enforceable. Similarly in *Flower v. London and North Western Railway Co.*, [1894] 2 Q. B. 65, the contract was held to be unfair and not binding on the infant. In *Stephens v. Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, an agreement by an infant to accept certain payments in lieu of his rights under the Workmen's Compensation Act, 1897, was set aside as not being for his benefit.

(a) *Wentworth v. Tubb*, 1 Y. & C. C. C. 171.

(b) The maxim of the Roman law was—"Furiosus nullum negotium gerere potest, quia non intelligit quod agit." Inst. Lib. 3, tit. 20, s. 8.

doubt that a lunatic would be held liable to pay for any services which had been rendered to him, provided they were such as might reasonably be considered necessary for a person in his station of life. In such a case the law would imply an obligation to pay for them out of his own property (c). And modern cases show that when a party entering into a contract is a lunatic, but the state of his mind is unknown to the other party, who has taken no advantage of the lunatic, he would not be allowed to set up his lunacy as a defence to an action on the contract, especially in a case where the contract was not merely executory, but executed in the whole or in part, and the parties could not be restored altogether to their original position (d).

Partners.

By the Partnership Act, 1890 (53 & 54 *Vict. c. 39*), it is provided:—

“Sect. 5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.”

It follows that with regard to hiring and dismissing clerks and servants, each partner would, generally speaking, have authority to hire and discharge such servants as might be necessary for the purpose of carrying on the business of the partnership (e).

Where, therefore, one partner gave a weekly servant due notice to quit, but the other partner afterwards authorised him to remain in the house where the partnership business was carried on, and of which the partners were joint tenants, it was held that such remaining was lawful, and that the partner who gave the notice to quit was not justified in turning the servant out by force on his refusing to go peaceably, as the rights of the partners were co-extensive (f).

Corporations.

Contracts in general, in order to be binding upon a corporation aggregate, must be under the common seal of the corporate body (g).

(c) *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Re Rhodes*, 44 Ch. Div. 94; *Wentworth v. Tubb*, *supra*.

(d) *Molton v. Camroux*, 2 Ex. 487; affirmed, 4 Ex. 17; *Read v. Legard*, 6 Ex. 636; *Beavan v. M'Donnell*, 9 Ex. 309; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

(e) See e.g., *Beckham v. Drake*, 9 M. & W. 79; 11 M. & W. 314.

(f) *Donaldson v. Williams*, 1 Cr. & M. 345.

(g) *Bac. Abr.* “Corporations,” E. 3; *Com. Dig.* “Franchises,” F. 13. In *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, it is shown that the doctrine is not, as it might appear, a mere relic of ignorant times. And see *Diggle v. London and Blackwall Railway Co.*, 5 Ex. 452.

This rule is to be found in all the authorities, "beginning with those collected from the *Year Books* in *Bro. Abr.*, *tit. Corporations and Capacities*, down to the latest of the present day; the ground of the rule being, that, as a corporation is a body politic and invisible, it can only act and speak by its common seal; or, as it is said *arguendo* in *Rex v. Bigg* (*h*), 'the common seal is the hand and mouth of the corporation' " (*i*).

Accordingly no municipal corporation (except London) (*k*) can appoint an attorney, except under the corporate seal. And, therefore, where (*l*) an attorney, who was town clerk and clerk of the peace, received instructions from the mayor and other members of the town council to take all necessary steps to oppose certain measures in Parliament, and to conduct certain suits in Chancery relating to the borough, but no authority was given to him under the seal of the corporation, it was held that he could not sustain an action against the corporation for his costs.

So where (*m*) a person, who, previously to the passing of the statute 5 & 6 Will. IV. c. 76 (now repealed), had held the offices of town clerk and clerk of the peace, and also clerk to the justices, was, after the passing of that statute, re-appointed to the offices of town clerk and clerk of the peace at an increased salary, by a resolution passed at a meeting, and entered upon the minutes of the town council; but there was no agreement under the seal of the corporation: it was held, upon issue joined on a return to a mandamus for compensation under 5 & 6 Will. IV. c. 76, s. 66, bringing in question the fact of the re-appointment, that it could not be proved by an entry in the minutes of the town council; and, therefore, although there was no doubt that an agreement to the effect contended for had been made, yet that it could not bind the corporation without being sealed.

And so it has been held (*n*) that a corn and coal meter to a corporation, who was entitled to receive for his own use certain fees for weighing coals from ships arriving at a port, must be appointed under seal, as he was an officer, and not a mere servant.

Upon similar principles where, in the articles of association of a company (afterwards incorporated), there was a clause providing that the plaintiff should be the solicitor for the company and should transact all the legal business of the company for the usual fees and charges, and should not be removed from his office unless for misconduct, which

(*h*) 3 P. Wms. 423.

(*i*) *Gibson v. East India Co.*, 5 Bing. N. C. 269.

(*k*) In London the appointment is matter of record; see *Mayor of Thetford's Case*, 3 Salk. 103.

(*l*) *Arnold v. Mayor of Poole*, 4 M. & G. 860. In *Hall v. Mayor of Swansea*, 5 Q. B. 544, Patteson, J., said, "The only difference I see between *Arnold's Case* and that of a servant employed at small wages is the comparative inconvenience of insisting on a contract under seal in the latter case."

(*m*) *R. v. Mayor of Stamford*, 6 Q. B. 433.

(*n*) *Smith v. Cartwright*, 6 Ex. 927.

articles were signed by seven persons who became directors, it was held that the plaintiff could not sue the company for discontinuing to employ him and employing other solicitors. "A joint stock company may act under their seal, or by the signature of their directors, which may have equal effect as their seal, or possibly by a resolution of the board. Nothing of the kind exists here" (o).

The general rule that a contract by a corporation must be under seal has also been affected by statute. By sect. 174 (1) of the Public Health Act, 1875 (p), it is provided as follows: "Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing, and sealed with the common seal of such authority." This section is imperative and applies to executed as well as executory contracts (q). But a medical man was held to be entitled to recover for work done by him under a verbal agreement with an urban authority that he should attend patients in tents erected on an outbreak of fever in the district, for which he was to be paid a small sum per day. His case was held not to be within sect. 174, though the total amount he claimed was over £50, inasmuch as it was not known at the time when the contract was entered into that his charges would exceed £50 (r).

Where an attorney had been retained generally under the common seal of the borough, and had also been authorised and retained by a resolution of the town council, to take proceedings in opposition to a rule *nisi* for a mandamus, it was held that this was a sufficient retainer to warrant the payment to him of the costs of so doing (s). And even where there is no retainer under seal "the want of a contract under seal is not such an objection as can now be relied upon, after the services have been rendered" (t), so that "an urban authority is not bound in an action for work done for them to set up the absence of a sealed contract" (u).

Where the Act of Parliament constituting a railway company enacted that the directors should have power to "appoint and displace any of the officers of the company," it was held that by reason of that provision such appointments need not be made under seal (x). But the provision does not cover appointments for work other than the ordinary work of the company (y).

(o) *Eley v. Positive Government Security Life Assurance Co.*, 1 Ex. Div. 88, 90.

(p) 38 & 39 Vict. c. 55.

(q) *Young v. Mayor, &c. of Royal Leamington Spa*, 8 App. Cas. 517; *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48; and see *Baker v. Holme Cultram U. D. C.*, 85 L. J. K. B. 799.

(r) *Eaton v. Basker*, 7 Q. B. D. 529.

(s) *R. v. Lichfield*, 10 Q. B. 534.

(t) *R. v. Prest*, 16 Q. B. 32, per Coleridge, J.

(u) *Bournemouth Commissioners v. Watts*, 14 Q. B. D. 87, per Hawkins, J., and see *R. v. Norwich Corporation*, 30 W. R. 752.

(x) *R. v. Cumberland Justices*, 17 L. J. Q. B. 102. See also *Scott v. Clifton School Board*, 14 Q. B. D. 500.

(y) *Cope v. Thames Haven Dock Co.*, 3 Ex. 841, 845.

There are, moreover, some cases (z) in which it has been held that the solicitors employed in obtaining the Acts of Parliament incorporating certain companies had a legal claim against them when incorporated, in respect of their services in obtaining the Act of incorporation, although they were not, and, from the nature of the case, could not be, appointed under the seal of the corporate body. But in each of those cases there was a clause in the Act directing that the costs of obtaining the Act should be paid, in preference to all other claims, out of the first money received by the defendants; and those cases were decided on the ground, that the meaning of the Legislature was to make the incorporated companies, as soon as they had obtained funds, debtors to the solicitors who had obtained the Acts, for all the costs which they had incurred (a). Those cases do not, therefore, as at first might appear, form any exception to the general rule above stated.

There are, nevertheless, some exceptions to that rule, probably coeval with the rule itself, in those matters which, from their very nature or necessarily frequent occurrence, it would be difficult or, perhaps, impossible to execute with the formality of a seal. "Hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions" (b). Such is the appointment of a bailiff to distrain or of a cook or a butler (c). But it has been held* that a clerk to the master of a workhouse at a salary of £52 a year with board and lodging, whose duties were to keep the books of the master, was not within the exception, and not having been appointed under seal, could not maintain an action for wrongful dismissal (d).

There is also another class of exceptions to the rule that corporations can only be bound by contracts under seal, which has arisen in modern times. "Corporations have, of late, been established sometimes by Royal Charter, more frequently by Act of Parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the Courts have held that they would imply in those who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an

(z) *Tilson v. Warwick Gas Light Co.*, 4 B. & C. 962; *Carden v. General Cemetery Co.*, 5 Bing. N. C. 253; *Hitchins v. Kilkenney Railway Co.*, 9 C. B. 536; *Wyatt v. Metropolitan Board of Works*, 11 C. B. (N. S.) 744.

(a) *Pardoe v. Price*, 16 M. & W. 451, 460.

(b) *Church v. Imperial Gas Light & Coke Co.*, 6 Ad. & E. 846, at p. 861.

(c) *Manby v. Long*, 3 Lev. 107; *Cary v. Matthews*, 1 Salk. 191.

(d) *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91. And see *Marchant v. Lee Conservancy Board*, L. R. 9 Ex. 60, where it was held, on the construction of a private Act of Parliament, that a clerk to trustees of a river navigation could not sue for a pension granted him by a resolution of the trustees not under seal.

authority to do those acts without which the corporation could not subsist" (e).

Accordingly, in a variety of cases, corporations have been held bound by, and able to take advantage of, contracts necessarily incident to the purposes and objects for which the corporation was created, although such contracts have neither been under the corporate seal, nor entered into by an agent or servant authorised in that manner to act for the corporation. The exception established by these cases (f) depends upon the principle, before adverted to, of expediency and convenience, amounting almost to necessity—a principle, however, which, although in many cases applicable to contracts of hiring and service, yet would only apply to contracts for services of an *ordinary* description, and such as might be necessary for carrying on the business of the corporation (g).

Thus, a contract made by the directors of a steam navigation company, incorporated for the purpose of trading as shipowners, to pay for services in bringing home a disabled vessel, has been held to be binding upon the company, though not under seal, as one of the most ordinary incidents to the ownership of trading vessels is the necessity of employing persons to bring home such vessels as may have been accidentally disabled at a distance from home (h).

There is another class of cases which may be regarded as forming an exception to the rule that corporations can only be bound by contracts under seal; those cases, namely, where work having been done or services rendered at the request of a corporation under a contract not under seal, and the corporation has had the benefit of the work or services, the person who has done the work may recover (i).

In an action brought by a tradesman to recover £12 15s. for some water-closets which at the orders of the guardians of a union he had put up in the union workhouse, and which the guardians approved of and accepted, but there was no contract under seal, Wightman, J., in delivering the judgment of the Court of Queen's Bench used these words:—"Wherever the purposes for which a corporation is created

(e) *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, 821; see also *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829; and compare *Paine v. Strand Union*, 8 Q. B. 326; *Smart v. West Ham Union*, 10 Ex. 867; 11 Ex. 867. A company must be regarded as a separate entity from any one of the shareholders, even though there is practically only one shareholder. Even where there is really only one shareholder, who is, moreover, the person carrying on the business, an employee may be the servant, not of such person, but of the company: *Booth v. Helliwell*, [1914] 3 K. B. 252.

(f) Mr. Justice Story says truly "that this exception affords a beautiful illustration of the expansive power of the common law, which acquires flexibility and moulds itself from time to time, so as to accomplish the various ends of modern society." Story on Agency, s. 53.

(g) *Dunston v. Imperial Gas Light and Coke Co.*, 3 B. & Ad. 125; *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 617; and see *Gibson v. East India Co.*, 5 Bing. N. C. 262, 271; *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829; *Church v. Imperial Gas Co.*, 6 A. & E. 853.

(h) *Henderson v. Australian Royal Mail Steam Navigation Co.*, 5 E. & B. 409.

(i) *Lawford v. Billericay Rural Council*, [1903] 1 K. B. 772, 786; *Douglass v. Rhyl Urban District Council*, [1913] 2 Ch. 407.

render it necessary that work should be done or goods supplied to carry such purposes into effect, as in the case of the guardians of a poor law union, and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal were wanting, and then say, no action lies, we are not competent to make a parol contract and we avail ourselves of our own disability " (j).

The guardians of a union employed an accountant to audit and make up their books, and resolutions to this effect were from time to time entered in the rough minute book, but there was no contract under the seal of the guardians. The Court of Queen's Bench held that the accountant was entitled to be paid for the work he had done (k).

Similarly, a corporation were held entitled to sue upon a contract which was not under seal and did not fall within the exceptions to the general rule requiring a contract by a corporation to be by deed, in a case where the contract was wholly executed on the part of the corporation, and the other party had received the benefit of the consideration moving from the corporation (l).

And where a colliery company contracted with an engineer for the erection of pumping machines for their colliery and paid him part of the price, the Court held that an action was maintainable by the company against the engineer for breach of contract in refusing to deliver the machinery, though the contract was not under seal, as the machinery contracted for "was clearly necessary for the purpose for which the company was formed, viz., the working of coal mines" (m).

Contracts may be made by parol on behalf of a company incorporated

(j) *Clarke v. Cuckfield Union*, 21 L. J. Q. B. 349. This judgment was approved and followed by the Queen's Bench in *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620 (sale of coals from time to time for use in a workhouse); and by the Court of Appeal in *Lawford v. Billericay Rural District Council*, [1903] 1 K. B. 772, in which they held that an engineer who had been employed by the district council upon a series of small orders to do work for them was entitled to be remunerated, although there was no contract under seal.

(k) *Haigh v. North Bierley Union*, E. B. & B. 873; discussed by the Court of Appeal in *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48.

(l) *Fishmongers' Co. v. Robertson*, 5 M. & G. 131; referred to with approval on this point in *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, 471.

(m) *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 617. A previous decision of the Queen's Bench (*London Dock Co. v. Sinnott*, 8 E. & B. 347), that an action could not be maintained by a dock company against the defendant for not performing a contract into which he had entered for scavenging the docks, because the contract was not under seal, was distinguished on the ground that in the latter case, although the corporation had power to contract by parol for purposes necessary to carry on its trade, the contract was not of that nature.

under the Companies (Consolidation) Act, 1908 (*n*), which, if made between private persons, would be valid although made by parol only.

And although, generally speaking, where the seal is affixed to a contract made by a corporation in a manner binding upon them, the contract is the contract of the corporation, to be governed by the same rules of law as the contracts of private persons; yet, where a corporation is created for particular purposes, with special powers, the contract does not bind them if it appear by the express provisions of its constitution, or by necessary and reasonable inference, that the contract was *ultra vires*, that is, that the Legislature meant that such a contract should not be made (*o*).

A contract of apprenticeship is not invalid on the ground that the master to whom the apprentice is bound is a corporation (*p*).

Bankrupts.

There are many reported cases in which attempts have been made to establish the doctrine that whatever a bankrupt earns by his personal labour or ability after the bankruptcy belongs to him. It is unnecessary here to go into these cases, which were discussed in the Court of Appeal in a case (*q*) in which the considered judgment of the Court was delivered by Lindley, M.R. It was there laid down that in the face of sect. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), it is impossible to maintain the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy and not wanted for his present support does not belong to his trustee. After bankruptcy and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for and recover such earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors, except to the extent necessary to support himself and his wife and family. It may be (*r*) that a bankrupt's trustee cannot maintain an action for money earned by the bankrupt since his bankruptcy by his personal exertions, if such money is required by him for his personal support and maintenance.

The Bankruptcy Act, 1914 (*s*), also provides that "where a bankrupt is an officer of the army or navy, or an officer or clerk, or other-

(*n*) 8 Edw. VII. c. 69, s. 76.

(*o*) *South Yorkshire Railway Co. v. Great Northern Railway Co.*, 9 Ex. 55; *Bateman v. Mayor of Ashton-under-Lyne*, 3 H. & N. 323; *Payne v. Mayor of Brecon*, 3 H. & N. 572.

(*p*) *Burnley Equitable Co-operative Society v. Casson*, [1891] 1 Q. B. 75.

(*q*) *Re Roberts*, [1900] 1 Q. B. 122. See now Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 38.

(*r*) *Williams v. Chambers*, 10 Q. B. 337; ("the pleadings in which, however, alleged promises to pay to the assignees for work done by the bankrupt." *Re Roberts*, [1900] 1 Q. B. 122, 128), distinguished in *Wadling v. Oliphant*, 1 Q. B. D. 145, 149.

(*s*) 4 & 5 Geo. V. c. 59, s. 51.

wise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct"; and further, "where a bankrupt is in receipt of a salary or income other than as aforesaid, or is entitled to any half-pay or pension or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the Court may direct."

In this enactment "income" means something to which the bankrupt is legally or equitably entitled, and therefore does not include a voluntary allowance (*t*). It also means something in the nature of a salary, so that money payable to an actor (*u*) at ascertained periods under a contract with a theatrical manager, and money payable periodically to a dentist (*x*) under a contract with a partner, is within the above provision; but the prospective and contingent earnings of a professional man such as a bone-setter (*y*) and the wages of a working man such as a coal miner (*z*) were held not to be "salary or income" within the meaning of the section.

The foregoing section 51 is applied in accordance with the principle that the residue passes to the trustee, after a fitting sum for the bankrupt's reasonable maintenance has been deducted (*a*).

- (*t*) *Ex parte Wicks, Re Wicks*, 17 Ch. D. 70.
- (*u*) *Re Shine, Ex parte Shine*, [1892] 1 Q. B. 522.
- (*x*) *Re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425.
- (*y*) *Ex parte Benwell, Re Hutton*, 14 Q. B. D. 301.
- (*z*) *Re Jones, Ex parte Lloyd*, [1891] 2 Q. B. 231.
- (*a*) *Re Graydon*, [1896] 1 Q. B. 417.

CHAPTER II.

THE CONTRACT OF HIRING AND SERVICE.

1. THE REQUISITES OF A CONTRACT OF HIRING AND SERVICE.

When Writing necessary—The Statute of Frauds.

By the Common Law a servant might be hired, either by deed or by a parol contract (a). But since the year 1677 it has become necessary in many cases that contracts of hiring should be in writing in order that they may be enforced by action.

The Statute of Frauds (29 Car. II. c. 3) enacts by sect. 4 that no action shall be brought "upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." This enactment does not render illegal or avoid a parol contract which does not comply with the requirements of the section. It deals merely with the evidence by which the plaintiff's cause of action on the contract is supported (b), and thus bars the remedy by action by which it might otherwise be enforced (c). Though an action cannot be brought upon the contract, it still exists, with the result that no new contract can be implied from acts done in pursuance of it (d).

The performance which is mentioned in sect. 4 has been decided to mean a performance by one party to the contract or the other, and therefore where the contract has been, or is capable of being, completely performed on one side within the year, the statute does not apply (e).

(a) A contract is called a Parol Contract, when either verbal, or in writing, but not under seal : see *Beckham v. Drake*, 9 M. & W. 79.

(b) *Fraser v. Pape*, 91 L. T. 340.

(c) *Britain v. Rossiter*, 11 Q. B. D. 123; *Leroux v. Brown*, 12 C. B. 801; *Maddison v. Alderson*, 8 App. Cas. 467.

(d) *Britain v. Rossiter*, 11 Q. B. D. 123; *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20. But the facts might afford evidence on which a jury could find that the parties had agreed to dissolve their former contract so that a new contract might be implied : *Cawthorne v. Cordrey*, 13 C. B. (N. S.) 406.

(e) *Donellan v. Reade*, 3 B. & Ad. 899; *Smith v. Neale*, 2 C. B. N. S. 67.

“ Where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply ” (f).

Therefore a contract for a yearly service which is to commence on a day subsequent to that of the making of the contract is within the statute (g), but to this rule there is the exception that a contract for a year's service to commence on the day following that on which the contract was made is not an agreement which is not to be performed within a year from the making thereof, and therefore is not within the statute (h).

Agreements for more than a year but subject to a defeasance by the happening of a certain event have been held to be within the statute: as an agreement for service for more than a year but determinable within the year by three months' notice on either side (i).

But the statute does not apply where an agreement for a yearly hiring is merely implied from circumstances, as in the case of a general hiring for a year (k). And it would seem to be the better opinion, that it does not apply where the agreement is by deed, as the object of the statute would be satisfied where the terms of the agreement were reduced into writing and authenticated by a seal or mark (l).

The equitable doctrine of part performance, which enables proof to be given of a parol agreement, notwithstanding the Statute of Frauds, applies only to contracts for the sale of land or cases in which a court of equity would entertain a suit for specific performance (m), and so not to a contract of service (n), or for work and labour (o).

In a case in which the statute applies, the agreement, “ or some memorandum or note thereof,” must, in order to support the action founded on it, be in existence at the commencement of the action (p).

When a memorandum is intended to be worked out by a more formal document, it is not necessary that every stipulation which would be

(f) *Souch v. Strawbridge*, 2 C. B. 808, 815; followed in *McGregor v. McGregor*, 21 Q. B. D. 424, 429; where *Davey v. Shannon*, 4 Ex. Div. 81, was disapproved, as by inference was also *Eley v. Positive Life Assurance Co.*, 1 Ex. Div. 20.

(g) *Britain v. Rossiter*, *supra*; *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Giraud v. Richmond*, 2 C. B. 835.

(h) *Smith v. Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 285, 538; approving *dicta* in *Cawthorne v. Cordrey*, *supra*, and disagreeing with *Dollar v. Parkington*, 84 L. T. 470.

(i) *Dobson v. Collis*, 1 H. & N. 81; following *Birch v. Earl of Liverpool*, 9 B. & C. 392.

(k) *Beeston v. Collyer*, 4 Bing. 309.

(l) *Cherry v. Heming*, 4 Ex. 631; *Holmes v. Mitchell*, 7 C. B. (N. S.) 361, 369.

(m) *McManus v. Cooke*, 35 Ch. D. 681.

(n) *Britain v. Rossiter*, 11 Q. B. D. 123.

(o) *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48.

(p) *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dixon*, 22 Q. B. D. 357.

contained in the latter document should be indicated, but the memorandum must contain all the essential terms of the agreement (*g*).

The memorandum may be in any form, and a note or letter written and signed by the party, containing the terms of the agreement, though written to a third person (*r*), even the party's own agent (*s*), would be sufficient to satisfy the statute. A letter repudiating the agreement has been held sufficient where it contained all the essential terms of the bargain (*f*). And even a note addressed to the other contracting party, attempting to withdraw from the agreement, may supply the name if not mentioned in the agreement (*u*).

It matters not from how many different papers the agreement be collected, provided they are connected in sense (*x*). If they refer to one another, they may be connected by parol evidence (*y*).

The writing must include the names of the parties to the agreement, but it is sufficient although they, or one of them, may be agents or agent for others, and it makes no difference whether the fact of agency can or cannot be gathered from the writing. Who the principals are may be proved by parol (*z*).

The word "agreement" in section 4 of the Statute of Frauds also includes the consideration upon which the agreement of the party to be charged is founded, as well as his promise (*a*).

Thus, where the defendant signed the following agreement, "I hereby agree to remain with L. for two years from the date hereof, for the purpose of learning the business of a dressmaker;" it was held that L. could not maintain an action against the defendant for leaving her service before the expiration of the two years, as the agreement did not show any obligation on L. to teach the defendant, and there was, therefore, no consideration expressed in the agreement (*b*).

And where (*c*) B. signed an agreement to "work for and with S., manufacturer of powder-flasks and other articles, at and in such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months; and so on from twelve months' end to twelve months' end, until I shall give the said S. twelve months' notice in writing that I shall quit his

(*g*) *Gray v. Smith*, 43 Ch. Div. 208.

(*r*) *Leroux v. Brown*, 12 C. B. 818, 822.

(*s*) *Gibson v. Holland*, L. R. 1 C. P. 1.

(*t*) *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Ex. 279.

(*u*) *Warner v. Willington*, 25 L. J. Ch. 662. See *Reuss v. Picksley*, L. R. 1 Ex. 342.

(*x*) *Crane v. Powell*, L. R. 4 C. P. 123; *Cave v. Hastings*, 7 Q. B. D. 125. Compare *Boydell v. Drummond*, 11 East, 142.

(*y*) *Ridgway v. Wharton*, 6 Ho. Lords Cas. 238; *Pearce v. Gardner*, [1897] 1 Q. B. 688; *Long v. Millar*, 4 C. P. D. 450.

(*z*) *Filby v. Hounsell*, [1896] 2 Ch. 737.

(*a*) *Wain v. Walters*, 5 East, 10; 1 Sm. L. C. 323; *Saunders v. Wakefield*, 4 B. & Ald. 596; and cases cited in note to *Birkmyr v. Darnell*, 1 Sm. L. C. 299.

(*b*) *Lees v. Whitcomb*, 5 Bing. 34; and see *Sweet v. Lee*, 3 M. & G. 452.

(*c*) *Sykes v. Dixon*, 9 A. & E. 693. Compare *Whittle v. Frankland*, 31 L. J. M. C. 81.

service: " the agreement was held void for want of mutuality, as S. was not bound to employ B.; and, therefore, it was also held that S. could not maintain an action against the defendant for harbouring B.

So, upon similar principles, an agreement by the defendants, that the plaintiffs should have the defendants' shipbroking business at the port of Sydney, upon certain terms, and that the defendants would provide the plaintiffs with a free passage to that colony, was held void, as not disclosing any consideration, the plaintiffs not being bound to work for the defendants (*d*).

All the cases, however, agree that it is enough if the consideration can fairly be collected from the terms of the writing (*e*).

Therefore, where the plaintiffs agreed in writing with L., that he would at all times, during the term of seven years, serve them as a crown-glass maker; that he would not, during the said term, work for any other person at any other glass-house or place of business, without the license of the plaintiffs; that it should be lawful for the plaintiffs to deduct from his wages any fine that he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame the plaintiffs should be at liberty to employ any other person in his stead without paying him any wages; that the plaintiffs should pay him when and so long as he should continue to be employed and work as a crown-glass maker, wages by the piece (stating them), and £8 per annum in lieu of house-rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's wages or a month's notice; it was held that, looking at the agreement altogether, it sufficiently appeared that the plaintiffs were bound to employ L. for the seven years subject to the notice, and that L. was bound to serve them for that period on the same terms; and therefore that the contract was binding on the parties as being founded on good consideration, and might be made the foundation of an action against the defendants for harbouring and employing the plaintiffs' servant (*f*).

And so, where (*g*) P. contracted to serve the plaintiff and his partners, for the time being, for seven years, in the business of a glass and alkali manufacturer, and at all times, during the term, to do his best endeavours and use his utmost care and diligence in the works; and further, that he would not at any time during the term neglect or absent himself from the said service without the consent in writing of the plaintiff or his partners for the time being, or either or such of them as should carry on the business, nor would work for or serve any other person without such consent; in consideration of which service

(*d*) *Payne v. New South Wales Coal, &c. Co.*, 10 Ex. 283.

(*e*) *Per Wightman, J.*, in *Powers v. Fowler*, 4 E. & B. 518.

(*f*) *Pilkington v. Scott*, 15 M. & W. 657.

(*g*) *Hartley v. Cummings*, 5 C. B. 247; and see *Williamson v. Taylor*, 5 Q. B. 175; *R. v. Welch*, 2 E. & B. 357; *Re Bailey*, 3 E. & B. 607.

the plaintiff agreed to pay P. 24s. per week for a certain amount of work, and to find him some other description of work, provided he should not require that quantity of the specified work, so that P.'s wages should not be less than 24s. per week, except when a furnace should be out, when P. agreed to work for 21s. per week; and it was agreed, that if P. should be sick or incapacitated from performing the service, or in case of misconduct, or if the plaintiff or his partners for the time being, or either or such of them as should carry on the trade, should discontinue the trade during the term—in either of such cases the plaintiff or his partners should be at liberty to retain or employ any other person in the room or stead of P., without being obliged to pay him any wages or satisfaction: it was held, that there was no want of mutuality in the contract, and that the plaintiffs were bound to employ P., and might maintain an action against the defendant for seducing P. from their service and harbouring him after notice.

If there sufficiently appear to have been a consideration, the Courts will not inquire into the adequacy of it, for that were, in truth, to inquire whether the parties have or not made a good bargain, which must be left to the parties themselves to settle (*h*).

But if the consideration appear to be illegal (*i*), either on account of fraud or immorality, or as being contrary to public policy or the enactments of any statute, the whole agreement will be vitiated, and cannot be made the foundation of any action (*k*).

Thus a contract for service and cohabitation would be void and could not be enforced in a Court of law, and parol evidence would be admissible to show whether the consideration for the hiring was wholly or in part cohabitation (*l*).

Where the plaintiff had carried on a business as a medical practitioner, but unlawfully because he had not the necessary statutory qualifications, and the defendant agreed to serve as assistant to him in the business, it was held that the whole agreement was illegal and no action would lie against the defendant for breach of a clause in the agreement that on the termination of his service he would not carry on a similar profession within ten miles of a certain place (*m*).

And where a contract is made on several considerations, any one of

(*h*) *Hitchcock v. Coker*, 6 A. & E. 438; *Archer v. Marsh*, 6 A. & E. 959; *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 C. B. 247; *Sainter v. Ferguson*, 7 C. B. 716.

(*i*) In *Paxton v. Popham*, 9 East, 408, 421, Lord Ellenborough said: "Since the case of *Pole v. Harrobin*, in 1782, it has been generally understood that an obligor is not tied up from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond."

(*k*) *Collins v. Blantern*, 2 Wils. 341; 1 Sm. L. C. 369; *Holman v. Johnson*, Cowp. 341; Ch. on Contr. 570; *Gas Light and Coke Co. v. Turner*, 6 Bing. N. C. 327; *Josephs v. Pebrer*, 3 B. & C. 639; *Cope v. Rowlands*, 2 M. & W. 149; *Græme v. Wroughton*, 11 Exc. 146.

(*l*) *R. v. Northwinfeld*, 1 B. & Ad. 912. See *Bradshaw v. Hayward*, Car. & M. 591.

(*m*) *Davies v. Makuna*, 29 Ch. D. 596.

which is illegal, the whole contract is void (*n*). If, however, the consideration be good, and the contract be partly good and partly bad, and that part which is good can be separated from that which is bad, the good part may be sustained (*o*). A distinction has been taken as to what is illegal at common law, and what is made illegal by particular statutes; and it has been said that the latter would vitiate the whole instrument, the former only that part which is illegal (*p*); but whether the whole is vitiated or not must depend, in great measure, on the enactments of the particular statute and, generally, the above rule applies (*q*).

A contract of hiring and service for a year, made on a Sunday, between a farmer and a labourer, is valid, notwithstanding the statute 29 *Car. II. c. 7, s. 5*, which enacts that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary calling on the Lord's day (*r*).

An agreement between a municipal corporation and the clerk of the peace for the borough on his appointment, whereby he agreed to accept a fixed salary in lieu of fees, and that any surplus should be paid to the borough fund, is illegal as against public policy, the fees being given to enable him to uphold the dignity and perform the duties of his office (*s*).

Where the agreement is one which, by the Statute of Frauds, is required to be in writing, it must also "be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." It is not, however, necessary to prove an agreement signed by *both* parties. It is sufficient if signed by the *party to be charged* (*t*), if accepted by word of mouth by the other party (*u*), but notice of such acceptance must be given (*x*). And this is enough, although it conclude, "As witness our hands" (*y*). Signature by means of a stamp is sufficient (*z*). Mere initials, however, are not sufficient (*a*). Signature at the commencement *may* be good, if placed

(*n*) *Jones v. Waite*, 1 Bing. N. C. 656; 5 Bing. N. C. 341; 9 Cl. & Finn. 101; *Shackell v. Rosier*, 2 Bing. N. C. 634; and see *Hopkins v. Prescott*, 4 C. B. 578; *Lound v. Grimwade*, 39 Ch. D. 605.

(*o*) Co. Litt. 206, b, note; *Wood v. Benson*, 2 Cr. & J. 95; and see *Price v. Green*, 16 M. & W. 346; *Nicholls v. Stretton*, 10 Q. B. 346.

(*p*) Per Bayley, J., in *Wood v. Benson*, 2 Cr. & J. 95; *Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664; and see 1 Wms. Saund. 66, note to *Butler v. Wigge*.

(*q*) *Re Burdett*, 20 Q. B. D. 310.

(*r*) *R. v. Whitnash (Inhabitants)*, 7 B. & C. 596.

(*s*) *Corporation of Liverpool v. Wright*, Johns. 359; *Mayor, &c., of Dublin v. Hayes*, Ir. Rep. 10 C. L. 226 (1876).

(*t*) *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Egerton v. Mathews*, 6 East, 307; *Hughes v. Budd*, 8 Dowl. 478; and see 3 M. & G. 462, note.

(*u*) *Smith v. Neale*, 2 C. B. (N. S.) 67; *Reuss v. Picksley*, L. R. 1 Ex. 342.

(*x*) 4 E. & B. 519, note.

(*y*) *Norton v. Powell*, 4 M. & G. 42.

(*z*) *Bennett v. Brumfitt*, L. R. 3 C. P. 28.

(*a*) *Sweet v. Lee*, 3 M. & G. 452.

in such a manner as to govern, or have the effect of authenticating, the whole instrument (b), as "I, A.B., agree" (c). But if, in such a case, the agreement conclude, "As witness our hands," it should be signed by the party to be charged at the end (d). And if not signed at the end, it is a question for the jury, if the party meant to be bound by it (e).

A signature to a document which contains the terms of the contract is available for the purpose of satisfying sect. 4, although put *alio intuitu* and not in order to attest or verify the contract, as in the case of the chairman of a joint stock company signing a minute recording the proceedings of the company (f).

If the agreement be signed by an agent, it is not necessary, provided that he be lawfully authorised, that his agency should be proved by writing (g).

The agent need not be expressly authorised to sign a document as a record of the contract. It is enough that he has written something which it was within the scope of his authority to write on behalf of his principal (h); and a subsequent adoption of the act of the agent, who has assumed to act as agent, is sufficient (i).

The signature of an agent acting for both parties is sufficient (k).

Contract of Apprenticeship.

A contract of apprenticeship must be executed by the apprentice himself (l). Execution by the master and the parent is not enough (m). But the apprentice may execute by the hand of a third party (n). The father or friend of the apprentice generally joins in the execution of the apprenticeship deed, since an action for breach of covenant will not lie against an infant apprentice (o), save where the custom of the City of London applies (p), or where the covenant is to do or refrain from

(b) *Caton v. Caton*, L. R. 2 H. L. 127.

(c) *Knight v. Crockford*, 1 Esp. 190; and see *Lobb v. Stanley*, 5 Q. B. 574 (note commencing with the defendant's name); *Durrell v. Evans*, 1 H. & C. 174; *Murphy v. Boese*, L. R. 10 Ex. 126; *Evans v. Hoare*, [1892] 1 Q. B. 593.

(d) *Hubert v. Treherne*, 3 M. & G. 743.

(e) *Johnson v. Dodgson*, 2 M. & W. 653; *Durrell v. Evans*, *ubi supra*. As to the absence of any date, see *Symmons v. Want*, 2 Stark. 371.

(f) *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314.

(g) *Cave v. Mackenzie*, 46 L. J. Ch. 564.

(h) *John Griffiths Cycle Corporation v. Humber & Co.*, [1899] 2 Q. B. 414.

(i) *Maclean v. Dunn*, 4 Bing. 722; *Fitzmaurice v. Bayley*, 6 E. & B. 868.

(k) *Durrell v. Evans*, 1 H. & C. 174; *Aldridge v. Great Western Railway*, 33 L. J. C. P. 161, 168.

(l) *R. v. Ripon (Inhabitants)*, 9 East, 295.

(m) *R. v. Cranford (Inhabitants)*, 8 East, 25; *R. v. Arnesby (Inhabitants)*, 3 B. & Ald. 584; *St. Nicholas, Rochester (Overseers) v. St. Botolph (Overseers)*, 12 C. B. (N. S.) 645.

(n) *R. v. Longnor (Inhabitants)*, 4 B. & Ad. 647.

(o) *Gylbert v. Fletcher*, Cro. Car. 179; *Capes v. Hutton*, 2 Russ. 357; *De Francesco v. Barnum*, 43 Ch. D. 165, 171.

(p) *Stanton's Case*, Moore (K. B.) 135; *Horn v. Chandler*, 1 Mod. 271; and see *Ex parte Eden*, 2 M. & S. 226; *Beard v. Webb*, 2 B. & P. 94, 99; Com. Dig. Justice of the Peace, B. 55.

addition of a secondary or collateral contract of hiring would not bring the case within the exemptions (d).

In *Hughes v. Budd* (e), the following agreement was held to require a stamp, and for want of one the plaintiff was nonsuited in an action for work and labour: "A memorandum of agreement between Isaac Hughes, quarryman, and the Y. Iron Company, that is, the said Isaac Hughes, quarryman, do engage to quarry a sufficient quantity at Craig Grew, to complete a dry wall which is to be erected from the canal bridge to the Swansea road, which wall is to continue both sides of the New Road as above mentioned. The stones are to be of a good and proper quality for the said walling, at the rate of two shillings per perch, thirty-six cubic feet to the perch." It was contended that it was not necessary that it should be stamped, either because it was an agreement with an artificer for his hire or a memorandum relating to the sale of goods. But Williams, J., was of opinion that it fell between the two, and was something composed of both. "It is not," said he, "to work generally, but to do a particular kind of work. Neither is it for goods sold and delivered, but it is to work on a particular mass of stone."

An agreement whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of £600 to perform the agreement, has been held to be sufficiently stamped with a common deed-stamp of £1 15s. (f).

In criminal proceedings, no objection can be taken on account of an agreement or other document being unstamped (g).

2. INTERPRETATION OF THE CONTRACT.

Admissibility of Parol Evidence.

Parol evidence is admissible to show that an agreement, even though embodied in a written document, was not intended to operate unless a particular event should happen (h).

Parol evidence is also admissible to show the circumstances under which an agreement was made, and to apply the words used to those circumstances, as in the following case (i): The plaintiffs, lace merchants in London, employed six travellers for different districts,

(d) *Smith v. Cator*, 2 B. & Ald. 778; *Sadler v. Johnson*, 16 M. & W. 775; *Chatfield v. Cox*, 18 Q. B. 321.

(e) 8 Dowl. 478; see *Poulton v. Wilson*, 1 F. & F. 403.

(f) *Mounsey v. Stephenson*, 7 B. & C. 403.

(g) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14.

(h) *Pym v. Campbell*, 6 E. & B. 370; *Davis v. Jones*, 17 C. B. 625; *Wallis v. Littell*, 11 C. B. (N. S.) 369; *Lindley v. Lacey*, 17 C. B. (N. S.) 578; *Pattle v. Hornibrook*, [1897] 1 Ch. 25.

(i) *Mumford v. Gething*, 29 L. J. C. P. 105.

In order that an agreement may come within the Stamp Act and require a stamp, it must be such an agreement as would be evidence against both the contracting parties; and, therefore, where (x) the defendants, being the provisional committee of an unincorporated association, made and signed a resolution "that E. T. be managing director of this association for three years, and John Vaughton (the plaintiff) secretary for the same period; that the remuneration to the former be settled at some future meeting; the latter to receive five pounds per week, and to act under the direction of the provisional committee;" but it did not appear that the plaintiff was present when it was made, or that he was consulted with respect to it, the Court of Common Pleas held that it did not require a stamp, not being either an agreement or a memorandum of agreement.

But where the minute of a resolution at a public meeting about a turnpike road, that the plaintiff, who was a surveyor, should be allowed an additional sum for extra trouble he would have, was read over to the plaintiff and assented to by him, it was held to require an agreement stamp (y).

A mere admission in a letter to a third person that the plaintiff was in the defendant's service does not require a stamp, not being an agreement between the parties (z).

The exemptions in the Stamp Act have been held not to apply to an agreement for the hire of a clerk (a). "Firemen and stokers" on board a steamer were, however, held (b) to come within a similar exemption in the old Stamp Act (55 *Geo. III. c. 184*) as labourers and artificers, and an overseer in a printing-office was also held to be an "artificer" within the exemption of the old Stamp Act (c).

In cases of mixed contracts, that is, contracts for the hire of labourers, &c., and something else, the question whether or not the contract is exempt from stamp duty as coming within the above exceptions must be determined by considering the whole scope and object of the contract. If its primary and main object be the hire of labourers, &c., it would be free from stamp duty, and not the less within the above exceptions, because it also contained some secondary or collateral stipulations to which the above exceptions would not apply. But if, on the other hand, the primary and main object of the contract be something clearly not within the above exceptions, then the mere

(x) *Vaughton v. Brine*, 1 M. & G. 359; and see *Beeching v. Westbrook*, 8 M. & W. 411; *Vollans v. Fletcher*, 1 Ex. 20; *Marshall v. Powell*, 9 Q. B. 779, and compare *Knight v. Barber*, 16 M. & W. 66.

(y) *Lucas v. Beach*, 1 M. & G. 417.

(z) *Frazer v. Bunn*, 8 C. & P. 704.

(a) *Dakin v. Watson*, 2 Cr. & Dix. Cir. Rep. (Irish), 225.

(b) *Wilson v. Zulueta*, 14 Q. B. 405; and see *R. v. Wortley*, 2 Den. C. C. 333; *Cornforth v. Danube and Black Sea Railway Co.*, 2 F. & F. 197.

(c) *Bishop v. Letts*, 1 F. & F. 401.

addition of a secondary or collateral contract of hiring would not bring the case within the exemptions (d).

In *Hughes v. Budd* (e), the following agreement was held to require a stamp, and for want of one the plaintiff was nonsuited in an action for work and labour: "A memorandum of agreement between Isaac Hughes, quarryman, and the Y. Iron Company, that is, the said Isaac Hughes, quarryman, do engage to quarry a sufficient quantity at Craig Grew, to complete a dry wall which is to be erected from the canal bridge to the Swansea road, which wall is to continue both sides of the New Road as above mentioned. The stones are to be of a good and proper quality for the said walling, at the rate of two shillings per perch, thirty-six cubic feet to the perch." It was contended that it was not necessary that it should be stamped, either because it was an agreement with an artificer for his hire or a memorandum relating to the sale of goods. But Williams, J., was of opinion that it fell between the two, and was something composed of both. "It is not," said he, "to work generally, but to do a particular kind of work. Neither is it for goods sold and delivered, but it is to work on a particular mass of stone."

An agreement whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of £600 to perform the agreement, has been held to be sufficiently stamped with a common deed-stamp of £1 15s. (f).

In criminal proceedings, no objection can be taken on account of an agreement or other document being unstamped (g).

2. INTERPRETATION OF THE CONTRACT.

Admissibility of Parol Evidence.

Parol evidence is admissible to show that an agreement, even though embodied in a written document, was not intended to operate unless a particular event should happen (h).

Parol evidence is also admissible to show the circumstances under which an agreement was made, and to apply the words used to those circumstances, as in the following case (i): The plaintiffs, lace merchants in London, employed six travellers for different districts,

(d) *Smith v. Cator*, 2 B. & Ald. 778; *Sadler v. Johnson*, 16 M. & W. 775; *Chatfield v. Cox*, 18 Q. B. 321.

(e) 8 Dowl. 478; see *Poulton v. Wilson*, 1 F. & F. 403.

(f) *Mounsey v. Stephenson*, 7 B. & C. 403.

(g) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14.

(h) *Pym v. Campbell*, 6 E. & B. 370; *Davis v. Jones*, 17 C. B. 625; *Wallis v. Littell*, 11 C. B. (N. S.) 369; *Lindley v. Lacey*, 17 C. B. (N. S.) 578; *Pattle v. Hornibrook*, [1897] 1 Ch. 25.

(i) *Mumford v. Gething*, 29 L. J. C. P. 105.

and the defendant was in their employ as assistant to one of those travellers. A vacancy having occurred in the M. district, the defendant in March, 1858, was engaged verbally by the plaintiffs to travel as head traveller for that district at a salary of £50 per annum, and £8 15s. per week for expenses, it being at the time arranged between them that the terms of the agreement should be reduced to writing. After the defendant had started on the journey and been absent three or four weeks, a list of towns and customers was sent to him, and the following agreement, which he signed and returned: "April 30, 1858. To H. & W. Mumford. In consideration of my entering upon your employ at a salary to commence with at £50 a year, I herewith agree to do so, with the understanding that in the event of my wishing to travel, and doing so, for any other house in the same trade on any part of the same ground to pay you the sum of £50. (Signed) W. Gething."

The defendant continued in the plaintiffs' employ till the early part of 1859, when he left them and travelled over the same district for a rival house in the same trade, upon which the plaintiffs brought an action against him for the £50. At the trial, amongst other things, it was objected that parol evidence was inadmissible to show that the agreement was to travel the M. district: but it was admitted, and the plaintiffs had a verdict for the £50. Upon a subsequent application to the Court to enter a nonsuit, the rule was discharged, and Erle, C.J., said: "I am clearly of opinion that the parol evidence which was objected to was admissible for the purpose of ascertaining the subject-matter to which to apply the contract. It was not tendered or admitted for the purpose of varying the contract itself, or of varying the sense of the words used, but for the purpose of showing what the circumstances were under which such wide words were used, and of applying those wide words to the circumstances. The agreement says, 'in consideration of my entering upon your employ.' Those words are very wide, and might include any possible employment, menial or otherwise, which one man could undertake for another; but it is not likely that the parties meant that. Then parol evidence was admissible to show in what sense those words were used, and being admitted it showed that the parties meant that the defendant was to enter into the employ of the plaintiffs as traveller in their trade on the M. journey. The written contract was drawn up with reference to a previous conversation and proposal, and the parol evidence applies the written words in accordance with that previous proposal. This view entirely agrees with that taken by the Court of Queen's Bench in the case of *M'Donald v. Longbottom (k)*, which was, if I may so speak of a decision to which I was myself a party, a perfectly sound decision. The written contract there described the article purchased as 'your wool,' and parol evidence was admitted of

a previous conversation between the parties to the effect that the wool about which they were contracting consisted partly of the plaintiff's own clip and partly of wool purchased from other persons. The parol evidence was admitted to identify the subject-matter of the contract, the words 'your wool' being wide and indefinite, as are the words 'your employ' in the contract which we are now considering."

And where there was a written contract "to engage Mr. P. for the term of three years," oral evidence was admitted to explain the contract by showing that the capacity in which the plaintiff was engaged was that of lace buyer (l).

But where the agreement is such that it is required by the Statute of Frauds to be in writing, parol evidence is not admissible to show verbal alterations of it, for that would be a direct violation of the statute (m). Moreover, "it seems to be unnecessary to inquire what are the essential parts of the contract and what not, and that every part of the contract, in regard to which the parties are stipulating, must be taken to be material" (n). Thus, where (o) a written agreement of hiring and service contained stipulations for *yearly* payments, evidence that a verbal agreement for *quarterly* payments had been made was rejected, and the fact of quarterly payments having been made was held not to vary the rights of the parties.

But although, where parties agree that a particular instrument shall contain the terms of the contract, parol evidence cannot be given to vary those terms (p), yet it may be given to annex incidents, as it is termed (q).

A custom, to be read into the contract in this way, must be "so universal that no workman could be supposed to have entered into this service without looking to it as part of the contract" (r), and must, moreover, be a reasonable one (s).

Therefore, in all contracts of hiring and service, which do not, either expressly or by necessary implication from the terms used, exclude the custom of the particular trade, business or occupation, with reference to which the contract is made, parol evidence is admissible to show that by the custom of the trade, &c., the contract is liable to be

(l) *Price v. Mouat*, 11 C. B. (N. S.) 508.

(m) *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Stead v. Dawber*, 10 A. & E. 57.

(n) Per Parke, B., in *Marshall v. Lynn*, 6 M. & W. 109, 117.

(o) *Giraud v. Richmond*, 2 C. B. 835.

(p) *Evans v. Roe*, L. R. 7 C. P. 138, where conversation at time of hiring was held to be excluded, as there was a contract in writing.

(q) *Hutton v. Warren*, 1 M. & W. 475; *Metzner v. Bolton*, 9 Ex. 518; see the cases collected in the note to *Wigglesworth v. Dallison*, 1 Sm. L. C. 546.

(r) *R. v. Stoke-upon-Trent (Inhabitants)*, 5 Q. B. 303, per Denman, C.J., at p. 307.

(s) *Bradburn v. Foley*, 3 C. P. D. 129; *Devonald v. Rosser & Sons*, [1906] 2 K. B. 728. See also *Meek v. Port of London Authority*, [1918] 1 Ch. 415 (affirmed, [1918] 2 Ch. 96), where Astbury, J., said (at p. 421): "*Primâ facie*, a practice by an employer to pay a tax such as income tax on his servants' salaries, ought to be regarded as in the nature of a bounty. It would require a very strong case indeed to turn a practice apparently of bounty into a usage of obligation."

put an end to by notice. So where (t) the plaintiff entered into the defendant's service, under a written agreement that he was to have "6s. a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing and to keep himself a pig, no poultry to be kept, his wife to keep the museum clean, he was to keep the gardens and pleasure-grounds in clean and good order, to assist in the stables, and, when required, at hay and corn harvest, and to make himself generally useful; to enter 12th May, 1838;" evidence was admitted to show that the plaintiff was by custom only entitled to a month's warning.

And evidence would be admissible of a custom as to the length of an engagement. Thus, in an action for wrongfully dismissing the editor of a newspaper, who had been engaged by letter, evidence was admitted to prove a custom that editors of newspapers were always engaged for a year, unless it were otherwise expressed at the time of making an engagement (u).

And where there was an agreement in writing to serve as agent or representative in a certain trade, evidence was admitted that it was the custom in that trade to dismiss at a month's notice, though the engagement was at a yearly salary (x). Evidence was also admitted to show that under contracts like the one in question, it was the custom for persons in the particular trade to have certain holidays in the year and the Sundays to themselves (y).

Words with a fixed meaning in a written contract cannot be explained by oral evidence to mean something different from what was said, though where the words are susceptible of more than one meaning, extrinsic evidence is admissible to show what were the facts which the negotiating parties had in their minds (z). So, in an action brought by a clerk for wrongful dismissal, it was held to have been properly left to the jury to say whether the plaintiff had been guilty of misappropriation of money remitted to him by the defendant "for business purposes," in having applied part of it to the payment of his own salary (a).

And "when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the contract relates, that meaning is *prima facie* to be attributed to it, unless, upon the construction of the whole contract, enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail. The consequence is that every individual case must be decided on its own grounds, and

(t) *Johnson v. Blenkinsopp*, 5 Jur. 870.

(u) *Holcroft v. Barber*, 1 C. & K. 4; *Baxter v. Nurse*, 1 C. & K. 13.

(x) *Parker v. Ibbetson*, 4 C. B. (N. S.) 346.

(y) *R. v. Stoke-upon-Trent Inhabitants*, 5 Q. B. 303. As to payment for holidays, see *Hurt v. Sheffield Corporation*, 85 L. J. K. B. 1684.

(z) *Bank of New Zealand v. Simpson*, [1900] A. C. 182.

(a) *Smith v. Thompson*, 8 C. B. 44.

upon the terms of the particular contract in dispute, regarded as a whole " (b).

Thus, where (c), by a written contract, the plaintiff agreed to perform at the defendant's theatre, and the defendant engaged her for three years, and engaged to pay her a salary of £5, £6 and £7 per week in those years, parol evidence was admitted to show that, according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more years, actors were only paid during the theatrical season.

But evidence of a usage inconsistent with the terms of the contract is inadmissible. So where a horse-trainer, by articles of apprenticeship, which were in a common form, agreed to find an apprentice sufficient meat, drink, wages, "lodging and all other necessities" during the apprenticeship, it was held that evidence of a custom in the trade that a master should charge the apprentice and deduct from his wages the cost of "clothes and washing" was inadmissible as being inconsistent with the terms of the contract, those things being included in the term "necessaries" which the master was to "find" gratis (d).

And it would seem that parol evidence is not admissible to contradict or vary implied, any more than express, incidents (e).

The Relationship created by the Contract.

Partner or Servant.—Arrangements are frequently made in trade between masters and brokers, clerks, travellers and other agents and servants employed by them, under which such persons, in lieu of receiving a fixed salary, are remunerated by a portion of the sums received by them on account of their master, or by a percentage on their earnings, or by a sum calculated with reference to the gross or net profits of their master or principal, or some part of such profits, or in some similar method. These various modes of payment, which are generally adopted with a view to secure or increase exertion, often give rise to a question how far the persons whose services are to be so remunerated are to be regarded as partners, and not mere servants or agents in the business.

The Partnership Act, 1890 (53 & 54 *Vict. c. 39*), s. 1 defines partnership as "the relation which subsists between persons carrying on a business in common with a view to profit," and by sect. 2 certain rules are laid down to which regard is to be had in determining whether a partnership does or does not exist. Rule (3) is as follows:

"The receipt by a person of a share of the profits of a business

(b) *Myers v. Sarl*, 3 E. & E. 306, per Blackburn, J., at p. 320.

(c) *Grant v. Maddox*, 15 M. & W. 737.

(d) *Abbott v. Bates*, 45 L. J. C. P. 117.

(e) *Burges v. Wickham*, 3 B. & S. 669, per Blackburn, J., at p. 697.

is *prima facie* evidence that he is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular . . . (b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such. . . . (d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto."

Where, therefore, a question arises between the parties to an agreement, the mere fact that one of them is to receive a portion of the profits of the business will not be conclusive that he is a partner in the business. Like every other agreement, the whole of it must be looked at in order to ascertain its meaning. The question is one of the intention of the parties as shown by the whole contract (f). The receipt by a person of a share of the profits of a business is, when taken by itself, evidence that he is a partner in it, and if it is the only piece of evidence before the Court, it is evidence on which the Court must act. But it is evidence which is capable of being rebutted by other circumstances, and if there are any other circumstances to be considered, they ought to be all fairly considered together. The whole scope of the agreement and all its terms ought to be looked at before any presumption of intention can properly be made at all (g).

The use of the word "salary" in the agreement, which implies payment to a servant, and which is a word not generally applicable to partners *inter se*, is strong, but not conclusive, evidence that the person who is to receive it was intended by the parties to the agreement to be a servant, and not a partner, of the person carrying on the business (h).

An agreement by which a person was to receive a fixed salary and one-eighth of the profits of a business, and was also to pay one-eighth of the losses, was held not to make him a partner, taking into consideration the other terms of the contract (i).

A partner, if he has all the rights incident to that position, would have a right to take a share in the control of the partnership business, but a servant would have no such right, unless under some special

(f) *Walker v. Hirsch*, 27 Ch. Div. 461.

(g) *Badeley v. Consolidated Bank*, 38 Ch. Div. 238; *Davis v. Davis*, [1894] 1 Ch. 393.

(h) *Ross v. Parkyns*, 20 Eq. 331.

(i) *Walker v. Hirsch*, 27 Ch. Div. 461.

contract. And a person having the right of control is not necessarily on that account a partner. Where, by a written agreement between Y. and J., it was arranged that J. should have certain large powers of control over Y.'s business, and should take charge of the office work and keep the books and accounts of the business, and manage and control the financial arrangements and affairs thereof, and should be entitled to draw and be paid out of the profits of the business for such services the sum of £3 per week, it was held that the presence of the clause giving large powers of control did not compel the Court to hold that a partnership was intended between the parties (*k*).

Where, under a contract of hiring and service, a salary is to be paid in proportion to the profits, the servant has a right to claim an account (*l*), and has therefore a right to overhaul the partnership books (*m*), unless by agreement he has deprived himself of that right (*n*).

Apprentice or Servant.—Another question, which was formerly of more importance than it is at the present day, though even now it may often arise, is whether the agreement into which the parties have entered was intended to create the relationship of master and apprentice, or master and servant. In deciding this point more attention is now paid to the main object of the parties than to the language used by them (*o*). Formerly it was held that unless the word "apprentice" was used, the contract might be considered one of hiring and service (*p*). But the cases in which that doctrine was laid down have long been overruled, and it is enough if the purpose of the contract is that one party shall teach and the other shall learn the trade (*q*), each case being held to depend upon its own particular circumstances (*r*). If the parties appear to have contemplated the relation of master and apprentice, then the contract must be considered as one of apprenticeship, and if it be an imperfect apprenticeship it cannot be treated as a contract of hiring and service (*s*). If, on the other hand, it appear that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring and service (*t*). Where teaching and learning appear to be the primary object of the parties, then, although work

(*k*) *Re Young; Ex parte Jones*, [1896] 2 Q. B. 484.

(*l*) *Harrington v. Churchward*, 29 L. J. Ch. 521.

(*m*) *Rishton v. Grissell*, 5 Eq. 326.

(*n*) *Turney v. Bayley*, 4 De G. J. & Sm. 332.

(*o*) *R. v. Nether Knutsford*, 1 B. & Ad. 730.

(*p*) *R. v. Little Bolton*, 2 Bott. 316; *R. v. Eccleston*, 2 East, 298.

(*q*) *R. v. Rainham*, 1 East, 531; *R. v. Laindon*, 8 T. R. 379; *R. v. Crediton*, 2 B. & Ad. 493; *R. v. Great Wishford*, 4 A. & E. 216, 223.

(*r*) *R. v. King's Lynn*, 6 B. & C. 99; *R. v. Edingale*, 10 B. & C. 739; *R. v. Northowram*, 9 Q. B. 24.

(*s*) *R. v. Bilborough*, 1 B. & Ald. 115; *R. v. Crediton*, 2 B. & Ad. 493; *R. v. Newtown*, 1 A. & E. 238; *R. v. Great Wishford*, 4 A. & E. 216; *R. v. Ightham*, 4 A. & E. 937; *R. v. Northowram*, 9 Q. B. 24.

(*t*) *R. v. King's Lynn*, 6 B. & C. 99, per Bayley, J.

is to be done for the master, the contract is to be considered as one of apprenticeship (*u*). But if working for the master appear to be the primary object, and teaching and learning the master's trade a mere secondary consideration, the existence of a stipulation by the master to teach, and a corresponding stipulation by the servant to learn the master's trade, will not alone prevent the contract from being considered one of hiring and service (*x*). The payment of a premium is strong, but not decisive, evidence to show that an apprenticeship was contemplated (*y*).

Tenant or Servant.—Where the occupation of a house by a servant is necessary for the performance of his services, and he is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties which he has to perform, his occupation is that of a servant, and he has no estate in the house (*z*). But where a servant is permitted to reside in a house of his employer, the fact that his occupation of the house is in part remuneration for his services does not prevent his occupation being that of a tenant (*a*). The question whether a servant occupies a house as a servant or as a tenant depends in each case on the terms of his agreement with his master. Where a servant occupies premises belonging to his master for the more effectual performance of the required service, as where a coachman occupies rooms over a stable, or a gardener an outhouse, or a gatekeeper a lodge in the park, or a porter a lodge at the park gate, his occupation is in law the occupation of his master (*b*). On the other hand, labourers living in cottages on the farms of their employer who were permitted but not required to live there on the terms that they were to give up possession when their employment ceased, and were either charged a reduced rent or had the rent deducted from their wages, were held not to occupy as servants but as tenants (*c*). Servants, when dismissed from their service, have no right to continue in the occupation of their houses as tenants, nor are

(*u*) *Horan v. Hayhoe*, [1904] 1 K. B. 288.

(*x*) *R. v. Crediton*, 2 B. & Ad. 497; *R. v. Billingham*, 5 A. & E. 676; *R. v. Northowram*, 9 Q. B. 24; and see *Hamilton v. Outram*, 17 Fras. M. & McP. 798.

(*y*) *R. v. King's Lynn*, 6 B. & C. 97, at p. 99; *R. v. Rainham*, 1 East, 532.

(*z*) *R. v. Spurrell*, L. R. 1 Q. B. 72; *White v. Bayley*, 10 C. B. (N. S.) 227. In that case the plaintiff, under an arrangement with a society, occupied a house belonging to them, and there published and sold the society's books, though he was also allowed to carry on business there for himself, and his occupation was held to be that of a servant only; *Clark v. Bury St. Edmunds*, 1 C. B. (N. S.) 23; *Dobson v. Jones*, 5 M. & G. 112.

(*a*) *Hughes v. Chatham Overseers*, 5 M. & G. 54; *Smith v. Seghill*, L. R. 10 Q. B. 422.

(*b*) *Dobson v. Jones*, 5 M. & G. 112, at p. 121; *Martin v. West Derby Assessment Committee*, 11 Q. B. D. 145; *Bertie v. Beaumont*, 16 East, 34; *R. v. Stock*, 2 Taunt. 339; *R. v. Rees*, 7 C. & P. 568; *R. v. Ashley*, 1 C. & K. 198; *St. Anne (Churchwardens) v. Linnean Society*, 3 E. & B. 793.

(*c*) *Marsh v. Estcourt*, 24 Q. B. D. 147; *Dover v. Prosser*, [1904] 1 K. B. 84.

they entitled to notice to quit (*d*). Nor are they entitled *de jure* to have a reasonable time allowed them for the removal of their furniture, &c.; but if they go on simply for that purpose, and do not remain an unreasonable time, or exclude their master, they could perhaps not be treated as trespassers (*e*). Under the law of settlement, the occupation of a tenement connected with and ancillary to the service, would not confer a settlement, though it would if wholly unconnected therewith (*f*). So a Wesleyan minister in the occupation of a house rented by the circuit stewards did not thereby gain a settlement by renting a tenement, he being in the position of servant to the circuit stewards (*g*); and a servant at an annual salary, who resided in two rooms within the walls of a lighthouse to take care of the light, was held not liable to be rated as occupier, his occupation being that of his master (*h*). But a servant was held to occupy as tenant and liable to poor rate, who took a house not belonging to his master, although his master paid the rent (*i*).

Where S., a brewer, by an agreement, reciting that he was in possession of a messuage and premises whereon the sale of beer and porter had been for some time last past and then was carried on and conducted by U. for and on S.'s account, agreed that M. might from the date of the agreement enter into and upon the said premises, and carry on and conduct thereon such trade or business for S. in the place and stead, in the same manner, and with and upon the same privileges and terms as U. had theretofore done, until the agreement should be determined and put an end to by one month's notice on either side; and the agreement also contained stipulations that M. should take all his beer from S., and not part with the trade or premises without S.'s consent, and on receiving notice to put an end to the agreement should quietly give up possession of the premises, trade fixtures, &c., without requiring any payment from S.: it was held both by the Queen's Bench and Exchequer Chamber to be abundantly clear that there was no relation between the parties but that of master and servant, and that M. could not maintain trespass against S. for entering without a

(*d*) *Mayhew v. Suttle*, 4 E. & B. 347; *White v. Bayley*, 10 C. B. (N. S.) 227. In an action brought by the servant against the master, the defendant may obtain an interlocutory injunction to restrain the servant from remaining on the premises: *Collison v. Warren*, [1901] 1 Ch. 812.

(*e*) *Doe v. M'Kaeg*, 10 B. & C. 721. See as to turning a servant's goods out of a house occupied by him as servant, *Lake v. Campbell*, 5 L. T. (N. S.) 582; and as to removing the servant and his furniture, *Hemmings v. Stoke Poges Golf Club, Ltd.*, [1920] 1 K. B. 720.

(*f*) *R. v. Seacroft*, 2 M. & S. 472; *R. v. Minster*, 3 M. & S. 276; *R. v. Cheshunt*, 1 B. & Ald. 473; *R. v. Iken*, 2 A. & E. 147. See also *R. v. Terrott*, 3 East, 506; *R. v. Ponsonby*, 3 Q. B. 14.

(*g*) *R. v. Tiverton*, 30 L. J. M. C. 79. The interest of such an occupant is determinable by a demand of possession without any previous notice to quit: *Doe v. Jones*, 10 B. & C. 718.

(*h*) *R. v. Tynemouth*, 12 East, 46; *R. v. Field*, 5 T. R. 587; *R. v. Shepherd*, 1 Q. B. 170.

(*i*) *R. v. Lynn*, 8 A. & E. 379; *R. v. Bishopston*, 9 A. & E. 824.

month's notice, as he had no such possession as would enable him to maintain such action (k).

A servant who has been put into possession of a house or other premises by his master cannot of course dispute his master's title, nor that of his master's devisee (l). If he wish to do so he must first give up possession (m).

Agent or Servant.—In *R. v. Walker* (n), Bramwell, B., thus defined the difference between a servant and an agent: "A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done."

Bailee or Servant.—Where "the cab proprietor hands over the horse and cab to the charge of the driver, to be used by him for the purpose of plying for hire at his own discretion and not subject to the proprietor's control," the driver paying the proprietor so much a day, the relation is that of bailor and bailee and not master and servant (o). Also drovers (p) and carriers are ordinarily bailees and not servants.

General Hiring, Yearly Hiring, &c.

Where no time is limited either expressly or by implication for the duration of a contract of hiring and service, the hiring is considered as a general hiring, and in point of law is presumed to be a hiring for a year (q). This rule is applicable to all contracts of hiring and service, whether written or unwritten, whether express or implied (r), and is not confined to servants in husbandry, but extends also to domestic (s) and other servants, such as clerks and others (t). But it is not an inflexible rule, and does not apply where the contract contains stipulations inconsistent with the application of it, or where from some well-known custom upon the subject the parties may be

(k) *Mayhew v. Suttle*, 4 E. & B. 347.

(l) *Doe v. Birchmore*, 9 A. & E. 662. This rule does not merely apply to ejectment: *Delaney v. Fox*, 2 C. B. (N. S.) 768.

(m) *Doe v. Baytup*, 3 A. & E. 188; *Doe v. Birchmore*, *abi supra*.

(n) 27 L. J. M. C. 207. See the case at length at p. 328, *post*.

(o) *Venables v. Smith*, 2 Q. B. D. 279, per Cockburn, C.J., at p. 282; *Fowler v. Lock*, L. R. 7 C. P. 272. But under the provisions of the Metropolitan Hackney Carriages Act, 1843, *quoad* third parties, the drivers are deemed to be the servants of the proprietors (*Smith v. General Motor Cab Co., Ltd.*, [1911] A. C. 188; *R. v. Gibbs*, 1 Dears. C.C. 445, p. 329, *post*.).

(p) *Milligan v. Wedge*, 12 A. & E. 737; but see *Turnbull v. Wieland*, 38 T. L. R. 143.

(q) Co. Litt. 42 b; *Fawcett v. Cash*, 5 B. & Ad. 904; *Lilley v. Elwin*, 11 Q. B. 742. There is scarcely a case upon the subject of settlement by hiring and service in which this rule is not admitted; and it is never denied in any one of them. But the master of a ship is not presumed to be hired by the owner for a year or any definite period: *Green v. Wright*, 1 C. P. D. 591.

(r) *Beeston v. Collyer*, 4 Bing. 309; *Elderton v. Emmens*, 6 C. B. 175; 13 C. B. 495.

(s) *R. v. Worfield (Inhabitants)*, 5 T. R. 506.

(t) *Huttman v. Boulnois*, 2 C. & P. 511.

considered to have contracted with reference to such custom, and thus to have excluded its application (*u*).

Nor does the rule apply to cases in which there has been a service, but no contract of hiring, and no circumstances from which a contract can be implied (*x*). And therefore where (*y*) an assistant-surgeon brought an action against his employer for the amount of salary due to him, and no specific contract of hiring was proved, but evidence was given of the service, and it appeared that after the plaintiff had been some time in the defendant's service he was taken ill and went to the hospital, and never returned nor was asked to return to his employment, and that he had been paid different sums of money, but not at any fixed or definite periods: although it was contended on the part of the defendant that the evidence showed a yearly hiring, and therefore that the plaintiff, having left his situation before the end of the year, could not recover any part of his salary, yet it was held that there was no evidence to show a hiring for a year, and the plaintiff recovered for the time he had actually served.

And a contract of hiring cannot be presumed where the circumstances tend rather to rebut such a presumption, as where paupers have been taken to live with their relatives (*z*) or with others out of charity (*a*), or where the agreement was for cohabitation and not merely for service (*b*).

But where there has been a service for more than a year, and wages paid without any express contract of hiring, it may be presumed that such service was under a contract for a yearly hiring (*c*).

And so where there has clearly been a contract, but not for any definite time, a yearly hiring may be inferred, and slight circumstances, such as an agreement to find clothes, will strengthen that inference (*d*). And, if the bargain be originally made for an entire year, but there is also a provision that in a given event it shall be competent to the parties, or either of them, to put an end to or suspend the service for a part of the year, the mere existence of this condition will not render it the less a hiring for a year; a conditional hiring being the same, for most purposes, as an absolute hiring until the condition is acted upon (*e*).

(*u*) *Baxter v. Nurse*, 6 M. & G. 935; *Fairman v. Oakford*, 5 H. & N. 635.

(*x*) As there were in *Beeston v. Collyer*, 4 Bing. 309.

(*y*) *Bayley v. Rimmell*, 1 M. & W. 506.

(*z*) *R. v. Sow (Inhabitants)*, 1 B. & Ald. 178.

(*a*) *R. v. Weyhill (Inhabitants)*, 1 Wm. Bl. 206; *R. v. Stokesley*, 6 T. R. 757; *R. v. Rickinghall (Inhabitants)*, 7 East, 373.

(*b*) *R. v. Northwingfield*, 1 B. & Ad. 912; *Bradshaw v. Hayward*, Carr. & M. 591.

(*c*) *R. v. Lyth (Inhabitants)*, 5 T. R. 327; *R. v. Long Whatton*, 5 T. R. 447; *R. v. Pendleton*, 15 East, 449; see *R. v. St. Martin, Leicester*, 8 B. & C. 677.

(*d*) *R. v. Macclesfield*, 3 T. R. 76; *R. v. South Newton*, 10 B. & C. 838; *R. v. Worfield*, 5 T. R. 506.

(*e*) *R. v. Byker*, 2 B. & C. 114; *R. v. Ossett cum Gawthorpe*, 4 B. & Ad. 216; *R. v. St. Helen's, Auckland*, 4 B. & Ad. 718; *R. v. Walbottle*, 9 Q. B. 248; *R. v. Sandhurst*, 7 B. & C. 557.

And this presumption, that a general hiring is a hiring for a year, may be greatly strengthened where there appears to be some general custom applicable to the particular trade, business or occupation in which the servant is engaged, to hire such servants by the year, and evidence of such custom is always admissible (f). Thus, where the plaintiff was engaged by the defendant, at a weekly salary, to edit a new periodical publication, evidence was admitted, on the part of the plaintiff, to show that it was the custom, in the case of editors and other persons regularly employed on newspapers, to engage them for the whole year. But as it did not appear that the custom applied to new publications, the jury found a verdict for the defendant, on the ground that the plaintiff was not hired for a year, and an application for a new trial was refused (g).

Where the only circumstance from which the intended duration of a contract of hiring and service can be inferred is the reservation of wages weekly, it must be taken to be weekly hiring (h). As where a man hired himself to a plumber and glazier, who was to find him board, lodging and washing at 6s. per week, summer and winter (i); or where the hiring was merely at so much a week (k); or where the servant was to live with his master, who was to find him board and lodging, and pay him 2s. 6d. a week (l); or where a servant in husbandry was to serve for the weekly wages of 4s., board, washing and lodging, except in the harvest month, when his wages were to be increased to 10s. 6d. per week, and then again reduced to 4s. (m); or where the hiring was at 8s. a week, and two guineas for the harvest, to do anything the gardener should set him about (n); or where a gardener having asked £20 a year, his master refused that, but agreed to give him so much a week (o); or where a man agreed "to accept the situation as foreman of the works of R. & Co., and to do all that lays in my power to serve them faithfully and promote the welfare of the said firm on my receiving a salary of £2 a week and house to live in" (p).

But where wages are calculated by piece-work and paid weekly, such weekly payment will not constitute a weekly hiring (q).

(f) It must be proved by instances, and cannot be supported by evidence of opinion merely: *Cunningham v. Fonblanque*, 6 C. & P. 44.

(g) *Baxter v. Nurse*, 6 M. & G. 935; and see *Williams v. Byrne*, 7 A. & E. 177.

(h) As to the notice, if any, necessary to terminate a weekly hiring, see cases of weekly tenancies: *Huffell v. Armistead*, 7 C. & P. 56; *Toune v. Campbell*, 3 C. B. 921; *Jones v. Mills*, 10 C. B. (N. S.) 788.

(i) *R. v. Dedham*, Burr. S. C. 653; 2 Bott. 292.

(k) *R. v. Newton Toney*, 2 T. R. 453; *R. v. Odiham*, 2 T. R. 622; *R. v. Hanbury*, 2 East, 423; *R. v. Mitcham*, 12 East, 351; see also *Baxter v. Nurse*, 6 M. & G. 935.

(l) *R. v. Pucklechurch*, 5 East, 382.

(m) *R. v. Dodderhill*, 3 M. & S. 243.

(n) *R. v. Lambeth*, 4 M. & S. 315.

(o) *R. v. Warminster*, 6 B. & C. 77.

(p) *Evans v. Roe*, L. R. 7 C. P. 138.

(q) *Warburton v. Heyworth*, 6 Q. B. D. 1.

And if there is anything in the contract of hiring to show that it was intended to be for a year, the reservation of weekly wages will not control it. As where the hiring was at 3s. per week the year round, with liberty to go on a fortnight's notice, this was held to be a yearly hiring (r). So where the hiring was at weekly wages, with a stipulation for a month's notice to determine the contract, on the ground that it was a hiring of which no certain portion of time could be predicted for its duration, it was consequently a general hiring, which the law says is a hiring for a year (s). And the mere fact of receiving wages monthly is not inconsistent with a yearly hiring; a contract for a year with monthly payments is still a yearly contract (t).

Termination of general hiring.

Where the hiring is a yearly hiring, it cannot, in general, be put an end to by either party before the end of the year (u). If, therefore, on the one hand, a master wrongfully dismiss his servant during the year, the servant may maintain an action against him for such wrongful dismissal (x). Whilst on the other hand, a servant wrongfully quitting his master's service, or rightfully dismissed for misconduct during the year, cannot recover any wages for the portion of the year during which he has served (y).

Where the defendant, having established smelting works at Carthagena, in Spain, offered to employ the plaintiff as foreman, by letter, containing the following passages: "I should require you to enter into an engagement to remain with me for, at least, three years, at my option; salary, £250 per annum"; it was held, that this did not enable the defendant to put an end to the service at his will, but that it was a yearly hiring, with an option for the defendant to require the plaintiff's service for three years, or to put an end to it at the expiration of the first, second or third year (z).

The above-mentioned rule is, however, subject to an exception in the case of servants of the Crown, who, whether civil or military, hold their offices only during the pleasure of the Crown, except in

(r) *R. v. Birdbrooke*, 4 T. R. 245.

(s) *R. v. Hampreston*, 5 T. R. 205; *R. v. Great Yarmouth*, 5 M. & S. 114; *R. v. Pershore*, 8 B. & C. 679.

(t) *Davis v. Marshall*, 4 L. T. (N. S.) 216.

(u) *Buckingham v. Surrey and Hants Canal Co.*, 46 L. T. (N. S.) 885. Even where a steward at £80 per annum was hired "three months' notice required on each side," it was held that the three months must end with the year: *Forgan v. Burke*, 12 Ir. C. L. R. 495. But see *Keon v. Hart*, Ir. R. 2 C. L. 138; 3 C. L. 388.

(x) *Beeston v. Collyer*, 4 Bing. 309. The action for wrongful dismissal is treated of *post*, p. 112.

(y) *Spain v. Arnott*, 2 Stark. 256; *Turner v. Robinson*, 6 C. & P. 15; 5 B. & Ad. 789; *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171; *Lilley v. Elwin*, 11 Q. B. 742.

(z) *Down v. Pinto*, 9 Ex. 327.

cases where it is otherwise provided by law. So where a consular agent was engaged for a period of three years certain it was held that the contract was determinable at the pleasure of the Crown (a). And in cases in which the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice, if the contract is determined by a notice in accordance with the custom, the servant is entitled to recover wages for the fractional portion of the year during which he has served.

Thus, in the case of domestic and menial servants, there is a well-known rule, founded solely on custom, that their contract of service may be determined at any time by a month's notice on either side or payment by the master of a month's wages (b). There is also a custom of which the Court is entitled to take judicial notice, that the service may be terminated at the end of the first month by notice given by either side at or before the end of the first fortnight of the service (c). If their contract of hiring is so determined, they are entitled to the amount of wages which have accrued due, and this is the case even though the servant breaks the contract by leaving without giving proper notice (d).

No general rule can be laid down as to who do and who do not come within the category of domestic or menial (e) servants. Each case

(a) *Dunn v. Reg.*, [1896] 1 Q. B. 116; *Shenton v. Smith*, [1895] A. C. 229; *Gould v. Stuart*, [1896] A. C. 575. But a naval officer cannot resign his commission without permission from the Crown: *Hearson v. Churchill*, [1892] 2 Q. B. 144.

(b) *Fawcett v. Cash*, 5 B. & Ad. 908; *Beeston v. Collyer*, 4 Bing. 313; *Turner v. Mason*, 14 M. & W. 112; *Metzner v. Bolton*, 9 Ex. 519, 520. *Semble*, it should be a calendar month's wages. See *Gordon v. Potter*, 1 F. & F. 644, in which Hill, J., directed the jury that they must give a cook as damages for wrongful dismissal the accruing wages up to the time when she was discharged, and a calendar month's wages in addition, without board wages, as a master had a right to discharge a servant simply by payment of a month's wages in addition to the accruing wages up to the time of the discharge. In *Lindsay v. Queen's Hotel Co., Ltd.*, [1919] 1 K. B. 212, referring to *Gordon v. Potter*, *supra*, it was said that although in that case it was laid down that the servant was entitled only to wages without board and lodging in lieu of notice, that decision was given in view of the right which the master possessed to dismiss on payment of a month's wages. The present case was different, for it was not governed by the custom referred to, and the question was, what was the servant entitled to when she was wrongfully dismissed? The ordinary rule as to damages must apply and the plaintiff was entitled to recover for the actual pecuniary loss which she had suffered. There had to be added to her wages a sum for board and lodging. In the words of Avory, J., "the custom that the damages for the wrongful dismissal of a domestic servant are one month's wages does not apply to a case where the wrongful dismissal occurs during the currency of a month's notice given by the servant."

(c) *George v. Davies*, [1911] 1 K. B. 445. Compare *Moult v. Halliday*, [1898] 1 Q. B. 125.

(d) *George v. Davies*, *supra*.

(e) There does not seem to be much difference in meaning between "domestic" and "menial"; but "a menial servant may be employed out of the house or household affairs, a domestic in or about the house only." *Toms v. Hammond*, Barnes, 370. The adjective "menial" is said in Skeat's Etymological Dictionary to be formed from the Middle-English word "meine" (meinee, maine, mainee), meaning a household; Old French, "maiserie" (maiserie, meisnee, meisnie); Low Latin, "mansionata," from Latin "mansio," a dwelling.

must depend upon its own circumstances. It has, however, been held (f) that a head gardener, at £100 a year, who resided in a detached house belonging to his master within his master's domain, and had the privilege of taking in apprentices, and had taken two apprentices for a year at £15 premium and had five under-gardeners employed for his assistance in the garden, was a menial servant, and only entitled to a month's warning; and a potman at a public-house was held to be a "domestic or menial servant" within sect. 10 of the Employers and Workmen Act, 1875 (g). A certified male nurse and masseur was held to be a domestic servant for the purpose of a legacy "to each of my domestic servants" (h). Again, it has been held (i) that the hiring of a huntsman by the master of the old Berkshire foxhounds on the following terms might be terminated at a month's notice. The terms were, "£100 a year, draft hounds, coals and bones, leave to keep a pig, two coats, two waistcoats, two pair of breeches, two pair of boots, one cap, one whip, one pair of spurs." In giving judgment in that case Erle, C.J., said: "The point is whether or not the plaintiff falls within the class of servants commonly termed in the cases and in the treatises . . . menial or domestic; because the law is now firmly established that the hiring for a year of a person in that class is subject to the condition that either party may put an end to the relation at any time upon giving the other a month's notice or a month's wages. Now is the plaintiff in that class of servants? It is well observed in the very excellent treatise on the Law of Master and Servant by Mr. Manley Smith, that 'no general rule can be laid down as to who do and who do not come within the category of menial servants. Each case must depend upon its own circumstances.' But it seems to me that the reason of the rule in these cases is that there are some contracts for services which bring the parties into such close proximity and frequency of intercourse—valuable if mutually agreeable, but intolerably annoying should it be otherwise—that it is highly desirable that either party should be at liberty to put an end to them if so minded, . . . it appears to me that a huntsman comes within the description of servants to which I have been referring."

But a jury of the county of Surrey held (k) that a gentleman was not justified in giving only a month's notice to a farm bailiff, and gave a verdict for a year's wages. And the Court of Exchequer held (l), so far as the question is to be treated as a matter of law, that a governess, at £60 a year and board and lodging, does not fall within

(f) *Nowlan v. Ablett*, 2 Cr. M. & R. 54: "A coachman or groom is a domestic servant," *ibid.*, per Alderson, B.; see *Johnson v. Blenkinsopp*, 5 Jur. 870.

(g) *Pearce v. Lansdowne*, 62 L. J. Q. B. 441.

(h) *Lawson, Re; Wardley v. Bringloe*, [1914] 1 Ch. 682.

(i) *Nicoll v. Greaves*, 17 C. B. (N. S.) 27.

(k) *Louth v. Drummond*, Kingston Spring Assizes, 1849 (see *Times*, March 28), *coram* Parke, B., who left it to the jury.

(l) *Todd v. Kellage*, 22 L. J. Ex. 1.

the rule by which a menial or domestic servant may be discharged with a month's notice or a month's wages. The position which she holds, the station she occupies in a family, and the manner in which such a person is usually treated in society, certainly place her in a very different situation from that which mere menial and domestic servants hold. The same may be said of a tutor. In Ireland it has been held that the housekeeper to a large hotel was not a menial servant (*m*). But in these and similar cases an arrangement should be made at the time of hiring as to the notice expected or required, or intended to be given.

In trades or callings other than those of domestic service in which a custom is alleged to exist as to the length of notice by which the service may be terminated, proof must be given of the custom which it is sought to rely upon. Thus evidence has been admitted of a usage of trade enabling a master to dismiss a commercial traveller at £150 a year, upon giving three months' notice (*n*); and of a custom in the woollen trade that either party might determine the service of an agent or representative upon giving a month's notice (*o*).

Notice in contracts other than yearly.

In the absence of any definite agreement and of any custom in the trade or calling, the contract of service will be terminable by a reasonable notice (*p*). Thus juries have found one month to be a reasonable notice for terminating the engagement of an advertising agent for a newspaper (*q*), and six months in the case of an editor (*r*) and of a sub-editor of a daily newspaper (*s*) and of a foreign correspondent to the *Times* newspaper (*t*). A regular contributor to a paper was held entitled to one month (*u*).

With regard to clerks, juries in London generally find that they are entitled to three months' notice, though, of course, that custom may be excluded by the terms of a particular hiring (*x*). Bank clerks

(*m*) *Lawler v. Linden*, Ir. Rep. 10 C. L. 188. See also *Savoy Hotel Co. v. London County Council*, [1900] 1 Q. B. 665.

(*n*) *Metzner v. Bolton*, 9 Ex. 518; *Grundon v. Master & Co.*, 1 Times L. Rep. 205.

(*o*) *Parker v. Ibbetson*, 4 C. B. (N. S.) 346. It was also held there that the question, whether or not the custom was excluded, was one for the Court and not for the jury, though it was for the jury to find the existence or non-existence of the custom alleged.

(*p*) See e.g., *Hamilton v. Bryant*, 30 T. L. R. 408; *African Association, Ltd., and Allen, Re*, [1910] 1 K. B. 396.

(*q*) *Hiscox v. Batchellor*, 15 L. T. 543.

(*r*) *Fox-Bourne v. Vernon & Co.*, 10 T. L. R. 647; cf. *Brennan v. Gilbert-Smith*, 8 T. L. R. 284, where a custom of twelve months' notice was established. See also *Grundy v. Sun Printing Association*, 33 T. L. R. 77.

(*s*) *Chamberlain v. Bennett*, 8 T. L. R. 234.

(*t*) *Lowe v. Walter*, 8 T. L. R. 358.

(*u*) *Re Illustrated Newspaper Corporation*, 16 T. L. R. 157.

(*x*) *Fairman v. Oakford*, 5 H. & N. 635; *Foxall v. International Land Credit Co.*, 16 L. T. 637.

have also been held entitled to three months' notice (*y*). A clerk to a telegraph company was held to be entitled to one month's notice (*z*).

By analogy to the rule which prevents a yearly tenancy from being determined before the end of the year, it is sometimes contended that particular yearly hirings can only be determined in a similar manner. This point will, in most cases, depend upon the custom of the trade or business in question. But where a schoolmaster was appointed, by trustees of a school, on the following (among other) terms: "The trustees shall pay you at the rate of £55 per annum, and no more, so long as, by mutual consent, you shall retain the office of master," &c., "the appointment to be subject to termination by three months' notice from either party,"—it was held that the three months need not terminate with the year (*a*). And Coleridge, J., in holding the analogy of tenants from year to year not to be applicable to the case, said: "Nothing is said in the resolution or letter that the notice is to be given to terminate at the end of a year. No doubt there is a rule, with respect to tenants of land from year to year, that a notice to quit must be to quit at the end of a complete year. But no authority has been adduced to show that a rule is applicable to notices to quit in all cases. In the case of land, there would be great inconvenience, arising from the nature of the property and the course of husbandry, to allow the relation of landlord and tenant to be terminated at any time; but with regard to a school, it must be of great importance that a master, who has done some act not sufficient to justify immediate expulsion, should not be allowed to continue in his office until the expiration of the current year. It seems, therefore, to me, that the trustees are justified in giving a three months' notice to terminate the schoolmaster's holding at any time during the year."

It has been held that an agreement of hiring (whereby wine merchants hired a commercial traveller) "to be binding between the said parties for twelve months certain from the date thereof, and continue from time to time until three months' notice in writing be given by either party to determine the same," may be terminated at the end of the first twelve months by three months' notice (*b*). But an agreement for twelve months certain, "after which time either party shall be at liberty to terminate this agreement by giving to the other a three months' notice in writing," was held to terminate at the end of the year without any notice (*c*).

(*y*) *MacDowall's Case*, 32 Ch. D. 366, at p. 371.

(*z*) *Vibert v. Eastern Telegraph Co.*, 1 Cab. & E. 17.

(*a*) *Ryan v. Jenkinson*, 25 L. J. Q. B. 11. See *Forgan v. Burke*, and *Keon v. Hart*, *ante*, p. 37, note (*u*); and *Bridges v. Potts*, 17 C. B. (N. S.) 314, 348.

(*b*) *Brown v. Symons*, 8 C. B. (N. S.) 208.

(*c*) *Langton v. Carleton*, L. R. 9 Ex. 57.

How far the Master is bound to find Work for the Servant.

A contract of hiring does not necessarily include a stipulation that the master will find work for the servant, though such a stipulation may sometimes, in cases where no definite terms have been made as to this matter, be implied from other stipulations or expressions to be found in the contract. But when parties have put into writing the terms upon which they agree, it is a dangerous thing lightly to imply what they have not expressed. The rule of the Court as to implying stipulations in contracts has been thus laid down (d) by Lord Esher, M.R.: "A large number of cases have been cited, in some of which the Court implied a stipulation, and in others refused to do so. In my opinion, it is useless to cite such cases, so far as they merely show that in the particular case an implication was or was not made. The only use of citing such cases is where they lay down the rule as to such implications, upon which the Court will act in dealing with the particular case before it. I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned. In the case of *The Moorcock* (e), Bowen, L.J., laid down the principle upon which such implications must be made in terms which seem to me to be really an expansion of the terms I have used, and with which I entirely agree." Bowen, L.J., also stated the general rule thus (f): "Where the contract as expressed in writing would be futile and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties, which is necessary to make the contract effectual."

In all these cases the ultimate consideration is what is the true construction of the contract in question, and each reported decision must be looked at with reference to the actual circumstances of the case. But "the broad general principle to be extracted from them is that, where the consideration which one of the parties is to receive depends on the other party continuing in the same condition, there is an

(d) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q. B. 488, 491. In this case a firm of brewers agreed to sell to the plaintiffs all the grains made by them, at certain prices for the next ten years following the agreement; and the Court refused to imply a term in the contract to the effect that the brewers would not by any voluntary act of their own (as by a sale of their brewery) prevent themselves from continuing the sale of grains to the plaintiffs for the period mentioned.

(e) 14 P. D. 64.

(f) *Oriental Steamship Co. v. Tylor*, [1893] 2 Q. B. 518.

implied obligation on the part of the latter to keep in existence the conditions out of which his ability to make a return for the benefit received by him arises " (g).

Thus (h) where two parties mutually agreed for a fixed period that one should employ the other as his sole agent for the sale of coals at Liverpool, and that the latter would not, during the continuancy of his agency, act as agent there for the sale of any other steam coal, the House of Lords held, upon consideration of all the terms of the contract, that no term could be implied in it binding the employer to keep his colliery, or to do more than employ the other party as his agent in the sale of such coals as he sent to Liverpool.

But in another case (i) the defendant agreed to employ the plaintiff for five years as agent and traveller for the sale of the various goods "manufactured or sold" by the defendant as should from time to time be forwarded by the defendant to the plaintiff. The payment of the plaintiff was to be a commission on the goods which he sold for the defendant. Two years after the agreement the defendant's factory was burnt down, and in consequence he gave up business. There being no reference in the agreement to the defendant's factory, and the plaintiff's employment not being confined to articles manufactured by the defendant, the Court held that no condition having reference to the continued existence of the defendant's factory could be implied by the defendant in the agreement; and the plaintiff's payment being by commission the defendant remained bound to send him a reasonable amount of samples to enable him to earn the commission.

The word "employ" is capable of more than one meaning, but the use of this word in a contract of hiring does not necessarily bind the master to find work for the servant during the continuance of the contract.

A company (k) agreed to "retain and employ" the plaintiff as their attorney at a fixed yearly salary in lieu of rendering an annual bill of costs for the business transacted by him for the company, for which salary he was to advise and act for the company on all occasions in all matters connected with the company, with certain exceptions. The House of Lords held that though the company were bound to pay the agreed salary for at least a year, they were not bound to supply the plaintiff with business as an attorney and solicitor at all events, or to

(g) Per Collins, M.R., in *Ogden's, Ltd. v. Nelson*, [1904] 2 K. B. 410; affirmed, [1905] A. C. 109.

(h) *Rhodes v. Forwood*, 1 App. Cas. 256.

(i) *Turner v. Goldsmith*, [1891] 1 Q. B. 544; explained in *Northey v. Trevillion*, 18 T. L. R. 648.

(k) *Emmens v. Elderton*, 13 C. B. 495. Whether an agreement by a company to employ a particular solicitor for all their business and to continue to do so, however incompetent he might prove to be in physical health or otherwise, until they could convict him of some positive misconduct, would be enforced by the Court, was doubted by Lord Cairns, L.C., in *Eley v. Positive Government Security Life Assurance Co.*, 1 Ex. D. 88.

require his services as attorney or solicitor whenever they had occasion for the advice or services of an attorney or solicitor.

So, too, where the defendants agreed to continue to "engage and employ" the plaintiff as their representative salesman for four years at a salary of £200 a year, and before the expiration of that period refused to give him any work as their representative salesman, though willing to pay the agreed salary, the Court of Appeal were of opinion that the defendants were not bound by the contract to provide the plaintiff with any work (l).

But in the case of a workman, paid by piece-work, and employed as a rollerman in the tinplate trade under certain printed terms, one of which was that the employment of any person "regularly employed" could not be terminated without the giving or receiving of a twenty-eight days' notice, it was held that the employers were bound to find the workman a reasonable amount of work until the termination of the contract by a twenty-eight days' notice, Farwell, L.J., pointing out that if the masters "had desired to put such a burden as this upon the workmen, of holding themselves at the masters' orders for twenty-eight, or possibly fifty-seven, days without work and without pay," it was their duty to say so in express terms (m).

A duty on the master to provide work for his servant may, however, be implied from other terms in the contract; for instance, where the payment is to be by commission according to the amount of work done (n); or where the nature of the employment is such that the opportunity of exercising it would be one of the main considerations from the servant's point of view (o).

An agreement to pay certain stipulated wages in proportion to the work done does not necessarily imply an obligation on the part of the master to find work so as to enable the servant to earn wages.

Thus, where (p) the defendant, who was the owner of a colliery,

(l) *Turner v. Sawdon & Co.*, [1901] 2 K. B. 653; and compare *Rubel Bronze & Metal Co., Ltd., & Vos, Re.*, [1918] 1 K. B. 315. In *Lagerwall v. Wilkinson, Henderson & Clarke, Ltd.*, 80 L. T. 55, the defendant engaged the plaintiff as a commercial traveller for a certain term on payment of a fixed salary and a fixed allowance as travelling expenses. On finding the matter unprofitable they ceased to give the plaintiff any employment but continued to pay him the salary. The plaintiff sued them for damages done to his trade connection by their refusal to send him on journeys and for loss of the amount of the allowance of travelling expenses which he would have saved. Bigham, J., held the action unfounded.

(m) *Devonald v. Rosser & Sons*, [1906] 2 K. B. 728; and, *semble*, that a custom in that trade that employers were entitled to shut down their works and suspend the employment of their men whenever they were not in a position to obtain orders at remunerative prices would be unreasonable and bad.

(n) *Turner v. Goldsmith*, *supra*, p. 43.

(o) *Bunning v. Lyric Theatre, Ltd.*, 71 L. T. 396. Compare *Turpin v. Victoria Palace, Ltd.*, [1918] 2 K. B. 539, where "upon a careful consideration of the contract and the circumstances of the case," McCardie, J., "arrived at the conclusion that there was no implied obligation on the defendants to permit the plaintiff to appear at their hall during the contract periods."

(p) *Williamson v. Taylor*, 5 Q. B. 175.

entered into an agreement with the colliers and workmen, and amongst others the plaintiff, whereby the said owner retained and hired the said other parties thereto "to hew, work, fill, drive, and put coals and do such other work as may be necessary for carrying on the said colliery as they shall be required or directed to do by the said owners, or their viewers or agents, at the respective rates and prices, and on the terms," &c. following: "First. The said owners agree to pay the said hereby hired parties once a fortnight, upon the usual and accustomed day, the wages by them to be earned, at the following rates, viz."—(specifying the rates, with regulations as to the manner of working). "Fifth. The said parties hereby hired shall, during all the times the pit shall be laid off work, continue the servants of the said owners, subject to their orders and directions, and liable to be employed by them at such work, as they shall see fit. Sixth. The said hewers hereby hired shall, when required, except when prevented by sickness or other sufficient unavoidable cause, do and perform a full day's work on each and every working day, or such quantity of work as shall be fairly deemed equal to a day's work, not exceeding eight hours, and shall not leave their work until such day's work, or quantity of work, is fully performed or finished to the extent of each man's ability; and in default thereof, each of the said parties hereby hired and so making default shall, for every such default, forfeit and pay to the said owners 2s. 6d. The pit to commence coal work at such times in the morning as shall be required to suit the trade." Then followed other clauses not material here. It was held that the agreement contained no promise on the part of the defendant to employ the plaintiff at reasonable times for a reasonable number of working days during the term, and that no action would lie against the defendant for not doing so, although the plaintiff was thereby unable to earn wages.

But where the contract of hiring provides for the payment of certain wages (not in proportion to the work done), although it may be optional on the part of the master to find work, and he may, if he pleases, discontinue his business, yet he must nevertheless pay the wages agreed on, whether he find work for the servant or not, or he will render himself liable to an action for such damages as a jury may think proper to give. .

Thus, where the plaintiff agreed to manufacture for the defendant, with the materials and machinery to be provided by him, cement of a certain quality, and on condition of his doing so the defendant agreed to pay the plaintiff weekly £4 for two years, and £5 weekly for the following year, and then to receive him as a partner; the plaintiff also further agreed to teach the defendant how to manufacture certain kinds of cement. Each party bound himself in a penal sum to fulfil the agreement, and the defendant afterwards covenanted

by deed for the performance of the agreement on his part. It was held that the stipulations in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during two or three years, although the defendant was bound by express words to pay the plaintiff the stipulated wages during those periods respectively, if the plaintiff performed, or was ready to perform, the condition precedent on his part (q).

And where (r) a declaration stated, that by deed between the defendant, and D., and the plaintiff, the plaintiff covenanted that D. should, for five years from the date, serve the defendant in the art of a surgeon dentist, and attend for nine hours each day, and the defendant, in consideration of the services to be done by D., covenanted with the plaintiff that he, the defendant, would, during the five years (in case D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise), pay D. 35s. per week for the first year, £2 per week for the second and third, and £2 2s. per week for the fourth and fifth; that D. was in the service for some time after the making of the deed till dismissed, and during all that time faithfully performed service, &c., and was willing and tendered to perform, &c. to the end of the five years, but the defendant, during the term, refused to permit D. to remain in his service, and dismissed him: it was held, on motion in arrest of judgment, that the declaration did not show any covenant corresponding to the breach.

Commenting on these two last cases in *Emmens v. Elderton* (s), Crompton, J., remarked that they "must be considered as decided upon the construction of the particular covenants and the peculiar circumstances appearing in those cases"; while Talfourd, J., regarded *Aspdin v. Austin* and *Dunn v. Sayles*, as establishing that "a contract . . . to pay wages or salary during a stipulated time does not imply an obligation to retain or employ the party entitled to receive it during the corresponding period; that if able and willing to render service, he is entitled to demand his wages; but that he cannot insist on being enabled to earn them."

In the following cases an agreement by the master to find work for the servant was implied. In *Pilkington v. Scott* (t), it was held that stipulations in an agreement whereby a workman was to be paid by the piece, that his master should pay him a moiety of his wages during any depression of trade, and might dismiss him on giving him

(q) *Aspdin v. Austin*, 5 Q. B. 671; see *Rust v. Nottidge*, 1 E. & B. 99; *Burton v. Great Northern Railway Co.*, 9 Ex. 507; *Sharp v. Waterhouse*, 27 L. J. Q. B. 70.

(r) *Dunn v. Sayles*, 5 Q. B. 685.

(s) 4 H. L. Cas. 624. In *Churchward v. Reg.*, L. R. 1 Q. B. 173, the contract was of a very special kind, and the general expressions used by Cockburn, C.J., in his judgment should be read in connection with the facts of the case (*Moon v. Camberwell Corporation*, 89 L. T. 594).

(t) 15 M. & W. 657.

a month's wages or a month's notice, distinguished the case from that of *Aspdin v. Austin*, and that, looking at the whole of the agreement, the master was bound to employ the servant in the sense of finding him actual employment, so as to enable him to earn wages, subject to the condition of notice. And a similar decision was made in *Hartley v. Cummings* (u), where there was an engagement on the part of the master to find the servant other work, in the event of the master not requiring the piece-work stipulated for, so as to enable the servant to earn a certain amount of wages per week.

And again, in *R. v. Welch* (x), where the workman, in consideration of a small sum lent in advance of wages, "and of the wages thereafter agreed to be paid to him" by the masters, agreed to work for and serve the said masters, as a tinplate worker, and not to work for or serve anyone else without their leave in writing, for the full term of twelve months then next, and also until the expiration of three calendar months' notice by the workman given to the masters to determine the service, and to perform his work in a workmanlike manner, and not to absent himself during customary hours of work; and the masters, in consideration of the good and faithful services of the workman, agreed to pay him "on the Saturday night in every week during the aforesaid term (usual holidays excepted) all such wages as the articles made by him as aforesaid shall amount to, at their usual workmen's prices for similar articles;" and the agreement also contained a proviso enabling either party to determine the agreement after twelve months by giving three calendar months' notice: it was held, in accordance with *Pilkington v. Scott*, that the agreement was not void for want of mutuality, and that the masters were bound to provide work; and Lord Campbell said, "The necessity of giving notice clearly shows that there is some obligation on the employer. What was that? To find reasonable employment according to the state of the trade. That is not an unilateral agreement, but a mutual agreement, with something to be done on each side."

And a similar decision was made in *Whittle v. Frankland* (y), upon an agreement between a collier and a coal company. In that case, Cockburn, C.J., said: "The agreement by the appellant is to serve the company faithfully and exclusively as their servant from the date of the agreement until the expiration of twenty-eight days' notice, and obey their lawful commands; and on the part of the employers the agreement is that they will pay him wages fortnightly, and not discharge him without twenty-eight days' notice. There is no express

(u) 5 C. B. 247; see this case, *ante*, p. 19.

(x) 2 E. & B. 357.

(y) 31 L. J. M. C. 81; and see *M'Intyre v. Belcher*, 14 C. B. (N. S.) 654; *Stirling v. Maitland*, 5 B. & S. 840, where a covenant to carry on a business was implied in an agreement to pay the plaintiff a certain sum in case A. was "displaced" from his employment as agent to defendants.

agreement that they will find him work, but that arises by necessary implication from the above two stipulations. The agreement would be perfectly illusory on the part of the employers if they could say that though they were obliged to keep him in their employ, they were yet not bound to supply work. The objection therefore as to want of mutuality fails."

Agreements in restraint of Trade contained in Contracts of Hiring and Service.

It frequently happens that professional men, manufacturers and tradesmen, on taking clerks, apprentices, servants and workmen into their employ, require them to enter into an agreement that they will not on leaving their service carry on a profession, manufacture or trade similar to their own within certain limits; and this is done with a view to secure themselves from competition with those who, having been in their service, have thereby had opportunities of becoming acquainted with their mode of carrying on business and with trade secrets, and of insinuating themselves into the good graces of their masters' customers.

Such contracts, being in restraint of trade, have been looked upon with much suspicion by the Courts on the ground of their being contrary to public interest. But many of these restraints of trade are perfectly consistent with the public interest. In the case of a tradesman hiring a servant on the terms that the servant will not carry on the same trade within certain limits, "The public," said Parke, B. (z), "derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business." And it was justly observed by Lord Wynford (a) that "the effect of such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry."

The law upon this subject has passed through considerable changes.

Time was when all agreements in restraint of trade or liberty to work were regarded as against public policy and invalid. In the well-known *Dyers' Case* (b) the obligation sued upon was not to carry on the trade of a dyer in a certain place for half a year, and this agreement drew from Hull, J., the remark that the plaintiff ought to be imprisoned and fined for obtaining such a bond. Again (c), in the last year of Queen Elizabeth, in an action on a bond conditioned

(z) *Mallan v. May*, 11 M. & W. 653.

(a) *Homer v. Ashford*, 3 Bing. 326.

(b) Y. B. 2 Hen. V., fo. 5, pl. 26.

(c) *Colgate v. Bachelar*, Cro. Eliz. 872; nom. *Claygate v. Bachelar*, Owen, 143.

to pay £20 if B. should use the trade of a haberdasher within the county of Kent before Midsummer, 1604, it was resolved by the Court "that this condition is against law, to prohibit or restrain any to use a lawful trade at any time or at any place; for as well as he may restrain him for one time or one place, he may restrain him for longer times and more places, which is against the benefit of the commonwealth; for being freemen, it is free for them to exercise their trade in any place."

Subsequently a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial, and this distinction was recognised and given effect to by Lord Macclesfield in a celebrated judgment (*d*), in which he laid down various propositions showing to what extent agreements in restraint of trade might be lawful. The rule laid down by the Court in that case was stated by Tindal, C.J. (*e*), to be: "That voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract, that is, so as it is a reasonable restraint only, are good."

The stringency of this rule was further relaxed, when it was decided (*f*) that it is not necessary, in order to support an agreement in restraint of trade, that the consideration should be "adequate" in the opinion of the Court. This decision has never been disputed, so that it is now only necessary that there be some legal consideration of value.

Thus in the case of an agreement in partial restraint of trade, the general rule is that, provided that valuable consideration is given for the restraint, the only test of its legality is its reasonableness.

In a considered judgment (*g*) in the Court of Appeal, Lindley, M.R., used the following words: "The law as now settled cannot in my opinion be more accurately expressed than it was by Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (*h*). He said: 'The true view at the present time I think is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—

(*d*) *Mitchel v. Reynolds*, 1 P. Wms. 181; 1 Sm. L. C. 406.

(*e*) *Horner v. Graves*, 7 Bing. 735, 741.

(*f*) *Hitchcock v. Coker*, 6 A. & E. 438.

(*g*) *Underwood & Son v. Barker*, [1899] 1 Ch. 300.

(*h*) [1894] A. C. 535, 565.

reasonable that is in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.' ”

If the reasonableness of the restraint is the test to be applied to all agreements in restraint of trade, it seems that the distinction formerly drawn between agreements in general restraint of trade and agreements in partial restraint is not now of much consequence. For, as pointed out by Lord Macnaghten (at p. 562) in the case just referred to, “ assuming the rule to be that general restraints are void as being contrary to public policy, and not on any other ground, an exception must surely arise, if exceptions are admissible at all, as soon as you find that the particular case under consideration is not contrary to public policy, and so not opposed to the principle on which the rule is founded.” And Lord Herschell, L.C., in the same case (at p. 548), said that “ when once it is admitted that, whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.”

The law as to contracts in restraint of trade was founded on public policy according to the ideas, and having regard to the business organisation, of the time, and public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade.

Where an agreement restraining a person from carrying on business is entered into with another person engaged in a similar business for the purpose of protecting him from rivalry in that business, and is no wider than is reasonably necessary for his protection in that business, it is difficult to imagine the circumstances which can render such an agreement injurious to the public interests of the country.

The reasonableness of a contract depends on its true construction and legal effect, and is consequently a question for the Court (*i*). Evidence from persons in the trade is admissible to inform the Court of its nature, and of what is customary in it, and of anything requiring attention in the mode of conducting it, and of any particular dangers requiring precautions, and what precautions are required in order to protect a person carrying on the business from injury by a person leaving his service, but the opinion of witnesses as to the reasonableness of the contract is out of place (*k*). The ordinary rules of construction should be first applied to find out what is the real meaning of the contract, and a stipulation in restraint of trade ought not to

(*i*) *Tallis v. Tallis*, 1 E. & B. 391; *Dowden v. Pook*, [1904] 1 K. B. 688.

(*k*) *Haynes v. Doman*, [1899] 2 Ch. 13.

be construed "with a bias as being *prima facie* illegal, but fairly" (l). Where a man of sufficient age and capacity knowingly enters into a contract of service which is in partial restraint of trade, the onus lies on him to prove that the restraint goes beyond what was reasonably necessary (m). Such a contract entered into by an infant, if beneficial, will be binding on him (n), but the onus is on the plaintiff to establish that the contract was for the infant's benefit (o).

If the Court on a fair construction of the whole agreement should come to the conclusion that the restraint imposed is larger than is reasonably necessary for the protection of the employer, but that the covenant is so framed as to be severable, it will enforce the covenant to the extent to which it is reasonable, while declining to enforce such part of it as is unreasonable. Covenants in restraint of trade have been held to be divisible in this way as regards the business not to be carried on (p), as regards space (q), and as regards time (r), also in the case of an infant's contract which is for his benefit (s).

But this rule only applies where the covenant, though single in form, really consists of two parts which can be treated independently. It does not enable the Court to reject a proviso to a clause and so give a different meaning to the whole (t), nor will the Court carve out a new covenant in order to render valid an instrument otherwise void; and so where a covenant restrained a servant after leaving the covenantee's employment from being concerned or interested in "any business whatsoever" within a certain distance of High Holborn, the Court, holding that the covenant as it stood was void, refused to reject the general restraint and make it good by limiting it to the business of a tailor, which was the kind of business carried on by the covenantee (u).

Coming now to the consideration of the meaning of "reasonable" in this connection, no precise limit can be laid down within which the restraint would be reasonable, and beyond which excessive. "We do not see how a better test," said Tindal, C.J., "can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is

(l) *Mills v. Dunham*, [1891] 1 Ch. 576, per Kay, L.J., at p. 589.

(m) *Mallan v. May*, 11 M. & W. 653; *Horner v. Graves*, 7 Bing. 735; *Rousillon v. Rousillon*, 14 Ch. D. 351; *Haynes v. Doman*, [1899] 2 Ch. 13.

(n) *Evans v. Ware*, [1892] 3 Ch. 502.

(o) *Sir W. C. Leng & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, 769.

(p) *Robinson & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451; *Rogers v. Maddocks*, [1892] 3 Ch. 346; *Maxim Nordenfelt Guns, &c. Co. v. Nordenfelt* [1893] 1 Ch. 630.

(q) *Mallan v. May*, 11 M. & W. 653; *Price v. Green*, 16 M. & W. 346; *Davies & Co. v. Lowen*, 64 L. T. 655; *Hooper & Ashby v. Willis*, 94 L. T. 624.

(r) *Nicholls v. Stretton*, 10 Q. B. 346; *Baines v. Geary*, 35 Ch. D. 154.

(s) *Bromley v. Smith*, [1909] 2 K. B. 235.

(t) *Perls v. Saalfeld*, [1892] 2 Ch. 149.

(u) *Baker v. Hedgcock*, 39 Ch. D. 520.

larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable " (x).

There are numerous cases in the books in which the Courts have given decisions as to the reasonableness of the restraints imposed in particular instances. But as the question in every case of the kind here referred to is whether the restraint, having regard to all the circumstances of the case and the nature of the employment, is greater than is reasonably necessary for the protection of the person in whose favour it is imposed, it is not proposed to discuss the terms of the contracts and the circumstances of all these decisions.

A restriction thought unreasonable sixty or even thirty years ago might now be held to be reasonable. The whole business organisation of society has been revolutionised by the use of railways, the post office, the telegraph and the telephone, so that a single firm may have a business extending over a vastly larger portion of the earth's surface than would have been dreamt of not very many years ago. And as businesses extend over a wider area, so wider restrictions will be considered reasonable for the protection of the persons carrying them on.

The time at which the contract was entered into is the moment at which its unreasonableness is to be considered (y).

A covenant is unreasonable and therefore incapable of being enforced if it is in restraint of carrying on any business whatever, and so where the Court construed a covenant to mean that the defendant was never thereafter to go into any business at all without the consent of the plaintiff, they held it to be unreasonable and void (z). And where a firm carried on business as galvanisers in Wolverhampton and London, a covenant whereby a retiring partner bound himself to retire "so far as the law allows" from the trade or business of the partnership, was held to be too vague to be enforced. In the words of Cotton, L.J. (at p. 388), "the parties must make up their minds to say what they agree to as regards the limits of time or space within which there is to be no trading" (a). Consequently agreements by which employers protect themselves from the future rivalry of those whom they take as servants are usually limited in some way either as regards the time during which the covenant is to extend, or as regards the places to which the covenant applies, or as regards the kind of business which the servant undertakes not to enter into. There are several instances in which agreements unlimited in point of time, so

(x) *Horner v. Graves*, 7 Bing. 735, at p. 748; cited with approval by Lindley, L.J., in *Rogers v. Maddocks*, [1892] 3 Ch. 346, and adopted by Lord Herschell, L.C., in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, at p. 549.

(y) *Rannie v. Irvine*, 7 M. & G. 970; *Haynes v. Doman*, [1899] 2 Ch. 13.

(z) *Perls v. Saalfeld*, [1892] 2 Ch. 149; *Baker v. Hedgcock*, 39 Ch. D. 520.

(a) *Davies v. Davies*, 36 Ch. D. 359, 388.

that they in fact were to last during the life of the covenantor, have been held good, reasonable limits as regards space and business being also provided for in the agreement (b).

Agreements not to carry on particular kinds of business for a fixed period of time were at one time held to be void if the agreement were unlimited as to space (c). "I consider that the cases," said Fry, J. (d), "in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable." In more recent cases it has been held that there is no such rule as that a covenant in restraint of trade is necessarily void if unlimited in regard to space, and such covenants have in certain circumstances been held reasonable and valid (e). Some businesses are world-wide, and in their case a world-wide restriction may be reasonable. In the case of a limited company, with a capital of £8,000, for the manufacture and sale of pneumatic tubes, a majority of the Court of Appeal held that a restraint against carrying on the same trade in the Eastern Hemisphere was reasonable (f).

When an agreement not to carry on a trade within a certain distance of a particular place has been established, it has been held that the distance should be measured by the nearest mode of access, and "that is to be considered the nearest way of access which a person making the best of his way from house to house would be likely to take: that is, using the footway where there was one, and where it was most convenient to use it, and the carriage-way, either where it could be most conveniently used, or where there was no footpath" (g). And "the nearest mode of access" must be taken according to the existing state of the streets. "If subsequently to the assignment the covenantor took a public-house, the distance of which, by the then shortest way of access, would be greater than that agreed upon from the one he sold, and a new street were afterwards opened, whereby the distance, by the shortest way of access, became less than that

(b) *Chesman v. Nainby*, 2 Lord Raym. 1456 (not to carry on the business of a linendraper within half a mile of a certain house); *Elves v. Croft*, 10 C. B. 241 (butcher within five miles); *Hitchcock v. Coker*, 6 A. & E. 438 (druggist within three miles of Taunton); *Hastings v. Whitley*, 2 Ex. 611 (surgeon within ten miles of S.); *Mumford v. Gething*, 7 C. B. (N. S.) 305; *Haynes v. Doman*, [1899] 2 Ch. 13 (hardware manufacturer within twenty-five miles of Dudley); *Hood v. Jones*, 81 L. T. Rep. 169 (hay and corn dealers within two miles).

(c) *Ward v. Byrne*, 5 M. & W. 548; *Hinde v. Gray*, 1 M. & G. 195; *Allsopp v. Wheatecroft*, 15 Eq. 59. See *Leather Cloth Co. v. Lonsont*, 9 Eq. 345.

(d) *Rousillon v. Rousillon*, 14 Ch. D. 351, at p. 369.

(e) *Rousillon v. Rousillon*, 14 Ch. D. 351 (champagne trade not to be carried on for two or ten years according to certain circumstances); *Badische Anilin und Soda Fabrik v. Schott*, [1892] 3 Ch. 447 (manufacture and sale of aniline dyes, &c., for three years); *Robinson & Co. v. Heuer*, [1898] 2 Ch. 451. In *Dowden & Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, a world-wide restriction for five years was held unreasonable with regard to the business of a cider merchant and cordial manufacturer in Devonshire.

(f) *Lamson Pneumatic Tube Co. v. Phillips*, 91 L. T. Rep. 363.

(g) Per Parke, J., in *Leigh v. Hind*, 9 B. & C. 775; compare *Atkins v. Kinnier*, 4 Ex. 776.

mentioned in the covenant, the covenantor would thereupon incur a breach of covenant" (h). •

In construing covenants of this sort, however, much must depend on the precise language used. When the Legislature has used the expression "within twenty miles," the Courts have laid down an arbitrary rule that the distance is to be measured in a straight line on a horizontal plane, or in popular language, "as the crow flies" (i). This rule has been applied by Wood, V.-C., in granting an injunction to restrain the breach of a covenant in restraint of trade (k), and, added the Vice-Chancellor, "if the parties mean the distance to be measured by roads and streets, they should say so."

In a subsequent case (l) in which the defendant assigned to the plaintiff the lease and goodwill of a public-house, and covenanted that if he should keep a public-house "within the distance of one half of a mile of the said premises" he would pay £500 as liquidated damages, it was held by the Exchequer Chamber that the distance should be measured on a map in a straight line as the crow flies, Blackburn, J., saying, "It is a very simple matter to take the ordnance map and with a pair of compasses measure the distance between any two points, and then by the scale ascertain what that distance is."

The parties to an agreement are not always careful to specify, or in any way limit, the nature of the trade or business which the covenantor binds himself not to carry on. But, as already pointed out, in construing these agreements the Court will apply the ordinary canons of construction which are applicable to contracts generally.

The contract must be construed with reference to the business of the plaintiff which it was the object of the parties to protect. "It is an ordinary canon of construction that the meaning of words in an agreement which, taken by themselves, are quite general, may be confined to a particular subject matter with which the parties were dealing" (m).

So where the plaintiffs employed the defendant in their business of dairymen, and he agreed that neither during his service nor afterwards would he serve or solicit or interfere in any way with any of the plaintiffs' customers in the said business, and it appeared that the plaintiffs' business of dairymen was carried on in Whitechapel and St. George's-in-the-East, the Court held that the agreement must be construed as relating to the business in the district in which the defendant was to be employed, and would not relate to a business which might

(h) Per Littledale, J., in *Leigh v. Hind*, 9 B. & C. 774, 779.

(i) *R. v. Saffron Walden*, 9 Q. B. 76; *Stokes v. Grissell*, 14 C. B. 678; *Lake v. Butler*, 5 E. & B. 92; *Jewel v. Stead*, 6 E. & B. 350.

(k) *Duignan v. Walker*, 1 Johns. 446.

(l) *Moufflet v. Cole*, L. R. 8 Ex. 32.

(m) *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478, per Lord Esher, M.R., at p. 481.

be set up by the plaintiffs in a different locality (*n*). And a covenant by an agent for an insurance society, who was employed by them in a certain district, not to interfere directly or indirectly with the business of his employers, after ceasing to be their agent, was held reasonable and valid as being, upon the construction of the whole contract, limited to the district in which he had been employed (*o*).

And where the defendant on entering into the service of a commission merchant in continental goods bound himself not to carry on for five years "any trade or business in the United Kingdom" in connection with any kind of continental goods dealt in by the plaintiff, the Court construed "any trade or business" as referring to the trade or business of commission merchant, and not including any kind of retail trade (*p*).

So, too, it was held that an agreement by a person not to "transact business" with any customers of his employer ought to be construed as confined to business similar to that of his employer (*q*).

It is not very easy to define what acts would amount to "carrying on" a particular profession or trade. In the case of a profession it has been held (*r*) that acting as salaried assistant to a surgeon was a breach of a covenant in which the defendant bound himself not to "set up or carry on the profession or business of a surgeon." But where the covenant was not to "set up in practice" within a certain district the covenantor, who resided just outside the district, was held not to have committed a breach of his covenant by attending, at their request, two patients within the district whose medical adviser he had previously been (*s*). A solicitor, who had bound himself when an articulated clerk not to "do any work or act for or on behalf of any person or persons usually done by solicitors" within a radius of fifteen miles from M., was held to have broken his covenant by writing professional letters as a solicitor, which he sent by post outside the prohibited area to persons residing within that radius (*t*). But there was no breach of a covenant "not to carry on the profession of a solicitor" within a certain radius when the defendant, a solicitor, wrote from his London office on behalf of a client within the prescribed area to a person within the same area demanding payment of a debt. He was carrying on his profession in the Strand, whence he wrote, not in the district where the client or the recipient of the letter resided (*u*).

(*n*) *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478; see also *E. Underwood & Son, Ltd. v. Barker*, [1899] 1 Ch. 300.

(*o*) *Barr v. Craven*, 89 L. T. 574.

(*p*) *Moenich v. Fenestre*, 61 L. J. Ch. 737; see also *Hood & Moores Stores, Ltd. v. Jones*, 81 L. T. 169.

(*q*) *Mills v. Dunham*, [1891] 1 Ch. 576; and see *Henry Leatham & Sons, Ltd. v. Johnstone-White*, per Farwell, L.J., at pp. 326-7.

(*r*) *Palmer v. Mallet*, 36 Ch. D. 411.

(*s*) *Robertson v. Buchanan*, 90 L. T. Rep. 390.

(*t*) *Edmundson v. Render*, [1905] 2 Ch. 320. See also "previous action for other breaches of this covenant before Kekewich, J., 90 L. T. Rep. 814.

(*u*) *Woodbridge & Sons v. Bellamy*, [1911] 1 Ch. 326.

In the case of a trade it has been held by Malins, V.-C. (x), that a covenant by the vendor of a business not to "carry on or be concerned or interested in" the business of a tailor was broken by the vendor's engaging himself as a journeyman to his nephew, who carried on the trade of a tailor under the same name within the prescribed limits. But a covenant not to "carry on or be concerned in carrying on the business of a chimney sweep either by himself or in conjunction with any other person or persons" within a certain radius was held not to have been broken by a defendant who acted as a servant in the capacity of a paid chimney sweep for somebody else carrying on the business (y). In another case it was held by Lord Romilly, M.R. (z), that to act as manager to a person carrying on the trade of a rag dealer was not a breach of a covenant by the defendant on the sale of his business not "to exercise or carry on the trade of a rag dealer either in his own name or that of any other person." But to accept a situation as buyer or manager is a breach of an agreement not to "engage" in any business similar to that carried on by the plaintiff (a). Soliciting orders as servant for another does not amount to a breach of an agreement not to carry on a business (b), nor does the mere lending of money to another without any real security except the profits of the business to help him in carrying on business (c). Nor would the covenantor be guilty of a breach of a covenant not to "carry on or be in anywise interested in" certain businesses, if his wife carried on the prohibited business, although in various ways he helped her in the business, unless the evidence showed that what was being done by the wife was a mere cloak or sham (d). Apparently "interest" in such a covenant means pecuniary or proprietary interest. And therefore it was held by Swinfen Eady, J., that employment in a shop, merely as a salesman at a fixed salary, was not a breach of a covenant not to be "interested either directly or indirectly" in a similar business to that carried on by his late employers (e).

Whether the business carried on by the covenantor is of such a nature as to constitute a breach of a covenant not to carry on a similar business depends in the first place on the exact terms of the contract. A covenant not to carry on the business of a restaurant similar to that carried on by R., an hotel-keeper with a restaurant on licensed premises connected with his hotel, was held (f) to be broken by carrying on a restaurant at which hot meat was sold, but for which the defen-

(x) *Newling v. Dobell*, 38 L. J. Ch. 111; see also *Jones v. Heavens*, 4 Ch. D. 636.

(y) *Ramoneur Company, Ltd. v. Brizey*, 104 L. T. 809.

(z) *Allen v. Taylor*, 19 W. R. 556.

(a) *Watts v. Smith*, 62 L. T. 453.

(b) *Clark v. Watkins*, 9 Jur. (N. S.) 142.

(c) *Bird v. Lake*, 1 H. & M. 111, 338.

(d) *Smith v. Hancock*, [1894] 2 Ch. 377.

(e) *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950.

(f) *Drew v. Guy*, [1894] 3 Ch. 25.

dant had not a licence for the sale of intoxicants, nor a victualler's licence. And an injunction was granted against a dealer in tea and groceries who was bound not to use his house as a coffee-house, to restrain him from supplying to customers light refreshments to be consumed on the premises (g).

Where the defendant on entering the service of an ale, porter, and spirit merchant bound himself not to "travel for any porter, ale, or spirit merchant as agent, collector or otherwise," it was held (h) that to enter as traveller into the service of a brewer was not a breach.

Where it is sought to impose a restraint upon an employee under a contract of service, a distinction is to be observed between the case of a servant who, on entering a new employment, may carry with him the trade secrets of his former employer, with the constant possibility of divulging them to rivals, and the case of an employee who by the industrious exercise of his abilities develops special qualities. In the latter case, as was pointed out by Lord Shaw in *Mason v. Provident Clothing and Supply Co., Ltd.* (i), "the equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden." So where a film actor who, under a particular pseudonym, had acquired a considerable reputation, was by his agreement precluded, upon its determination, from using his pseudonym "for any purpose whatever," the restraint was held to be unenforceable (k).

A restrictive covenant which is for the benefit of the business rather than for the benefit of an individual passes to an assignee of the covenantee's business. So a purchaser of the covenantee's business, to whom the covenant has been assigned, can sue for a breach (l). But such a covenant, on its true construction, must not be merely a personal one so as to come within the rule as to the non-assignability of personal contracts (m).

In a case in which the covenantees were partners, it was held that, after the dissolution of the partnership, one partner was able to sue by himself for an alleged breach of the covenant (n).

Together with the class of contracts already considered, whereby a servant may bind himself after leaving his employer's service not to carry on a business similar to that of his employer, may be classed those in which a clerk or other servant binds himself not to interfere with, or solicit the business of, those persons who are his employer's customers.

(g) *Fitz v. Iles*, [1893] 1 Ch. 77. (h) *Josselyn v. Parson*, L. R. 7 Ex. 127.

(i) [1913] A. C. 724, at pp. 740-1.

(k) *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch. 1.

(l) *Benwell v. Inns*, 24 Beav. 307; *Baines v. Geary*, 35 Ch. D. 154; *Jacoby v. Whitmore*, 49 L. T. 335; *Townsend v. Jarman*, [1900] 2 Ch. 698.

(m) *Davies v. Davies*, 36 Ch. D. 359. See also *Cooke v. Calcroft*, 2 W. Bl. 856 (executors of A. not bound by covenant of A. not to exercise a particular trade).

(n) *Palmer v. Mallet*, 36 Ch. D. 411.

The same general principles of law are applicable to these contracts, and an agreement of this kind is valid if it goes no further than is necessary for the protection of the employer in his trade. The customers need not be named in a schedule (o).

Thus, where (p) an articled clerk to an attorney, in consideration of the attorney taking him as an articled clerk without any premium, covenanted that he would not during the articles, or at any time after their expiration, interfere with, or act as attorney or agent for, "any person who had already been, or who should from time to time thereafter become or be, the client or correspondent in business" of the attorney, or any partner of his, or any person to whom he might sell his business, it was held that the attorney might recover in respect of breaches of covenant with regard to persons who had been his clients before and at the time of making the deed, and of persons who had been his clients whilst the clerk continued under articles.

In a somewhat similar covenant with a London solicitor, the word "clients" was held to include the country solicitors for whom he acted as agent (q).

So, too, an injunction has been granted to restrain the defendant from serving or interfering with any persons who were customers of the plaintiff, a dairyman, at any time during the defendant's employment by him (r).

The performance of a contract in restraint of trade is often secured by a bond or covenant not to do that which it is intended to prohibit, and, in the event of a breach of that stipulation, to pay a certain sum as a penalty or as liquidated damages.

The question whether the sum fixed by the parties is to be treated by the Court as a penalty or as liquidated damages is not decided by the name by which the parties have described it. A succession of judges have held that the use of the term "penalty" or "liquidated damages" is not conclusive, though perhaps where the parties themselves call the sum made payable a "penalty," the onus lies on those who seek to show that it is liquidated damages.

If in any particular case the Court should rule that a sum agreed to be paid is a penalty and not liquidated damages, evidence will be admissible to show what were the actual damages caused by the breach.

The earlier cases (s) were the subject of an elaborate exposition by

(o) *Hunlocke v. Blacklowe*, 2 Wms. Saund. 156; *Rannie v. Irvine*, 7 M. & G. 969.

(p) *Nicholls v. Stretton*, 10 Q. B. 346.

(q) *Reid v. Burrows*, [1892] 2 Ch. 413.

(r) *Baines v. Geary*, 35 Ch. D. 154; *Dubowski & Sons v. Goldstein*, [1896] 1 Q. B. 478. In the latter case are some observations as to the reasonableness of a covenant referring to persons becoming customers of the employer after the servant has left him.

(s) *Atkyns v. Kinnier*, 4 Ex. 776; *Kemble v. Farren*, 6 Bing. 141; *Horner v. Flintoff*, 9 M. & W. 678; *Green v. Price*, 13 M. & W. 695; *Galsworthy v. Strutt*, 1 Ex. 659; *Reynolds v. Bridge*, 6 E. & B. 528; *Mercer v. Irving*, E. B. & E. 563; *Betts v.*

Sir George Jessel, M.R. (t), and it seems sufficient here to mention the principal rules that have been laid down.

“One rule which appears to be recognised in the cases,” says Lord Esher, M.R. (u), “as a canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the Court as liquidated damages and not a penalty,” and he mentions as an exception to that rule a case where the sum agreed to be paid is, with regard to the matter in respect of which it is to be paid, so large as to make the idea that it was intended to be payable by way of liquidated damages so absurd that the Court would be compelled to arrive at the conclusion that it was to be paid not as liquidated damages, but as a penalty.

Another important rule has reference to cases in which a fixed sum is made payable, not for the doing or omitting to do some one thing, but in order to secure the performance of several stipulations. If these stipulations are of varying degrees of importance so that the damages arising from breaches of them respectively will be of substantially varying amounts, the agreed sum is *prima facie* to be regarded as a penalty and not as liquidated damages (x).

Servants who have entered into binding contracts not to carry on certain businesses after leaving their master's service, may be restrained by injunction from committing breaches of their agreement (y).

If the sum which may be claimed as liquidated damages for a breach by the servant of his agreement has been fixed by the parties at an amount within the limit of the County Court jurisdiction, an action for an injunction may be brought in the County Court (z).

The terms of the contract may possibly show that the intention of the parties was that the servant might be at liberty to carry on the prohibited business after leaving his master's service upon payment of a fixed sum as a penalty. But in the case of an ordinary bond it would be no answer to a claim for an injunction that the defendant was willing to pay the penalty (a), and in the case of contracts such as are now under consideration, it will be a question for the Court whether there can be gathered from the contract an agreement by the servant that he will not carry on the prohibited business. If the

Burch, 4 H. & N. 506; *Sparrow v. Paris*, 7 H. & N. 594; *Magee v. Lavell*, L. R. 9 C. P. 107; *Lea v. Whitaker*, L. R. 8 C. P. 70; *Re Newman*, 4 Ch. D. 724.

(t) *Wallis v. Smith*, 21 Ch. D. 243.

(u) *Lav v. Redditch Local Board*, [1892] 1 Q. B. 127.

(x) *Willson v. Love*, [1896] 1 Q. B. 626; *Strickland v. Williams*, [1899] 1 Q. B. 382.

(y) *Nicholls v. Stretton*, 7 Beav. 42; *Howard v. Woodward*, 34 L. J. Ch. 47; *May v. O'Neill*, 44 L. J. Ch. 660.

(z) *Stiles v. Ecclestone*, [1903] 1 K. B. 544.

(a) *French v. Macale*, 2 Dr. & W. 269.

penalty is agreed to be recoverable "as liquidated damages," that will go to show such an agreement by the servant, because the use of the word "damages" implies a breach of an agreement (b). If an agreement not to carry on the trade can be gathered from the contract, then the Court will probably enforce it by injunction (c), though the penalty be expressed to be payable as liquidated damages. But a master is not entitled to an injunction in addition to the amount agreed on as liquidated damages; and if, on the other hand, he elects for an injunction, he cannot also have judgment for the liquidated damages (d).

Injunctions have been granted to restrain defendants from committing breaches of agreements not to carry on certain trades after leaving the plaintiff's service, where the defendants were infants at the time they made the agreements (e).

Persons who enter into contracts of service occasionally bind themselves at the same time not to do work for any one but their master so long as they remain in their master's service. Such a covenant is valid (f), but it will not be enforced by an injunction so as to compel one person to be the servant of another (g).

A contract to serve another during the contractor's life is not invalid. So where a man who for many years had carried on the business of a carrier (h) sold and assigned the goodwill of his business to the defendants, and covenanted with them that he would not at any time from thenceforth during the term of his natural life, either by or for himself, or for or with any other person whomsoever in trust for him, or to or for his benefit, set up, exercise, or in any sort or manner howsoever use or follow the trade or business of a carrier except as thereafter was excepted, and that he would from thenceforth during his life well and faithfully serve the defendants as an assistant in the said trade or business of a carrier, &c., and the defendants covenanted to pay him certain weekly sums: it was held that the agreement was not void as being in general restraint of trade.

It is a general rule of the Court not to grant decrees for the specific performance of agreements that are strictly personal in their nature, such as agreements of hiring and service (i), but in certain cases where

(b) *National Provincial Bank of England v. Marshall*, 40 Ch. D. 112. But an agreement may be extracted from the condition of the bond for the payment of a fixed penalty without any agreement as to the penalty being liquidated damages: *London and Yorkshire Bank v. Pritt*, 56 L. J. Ch. 987.

(c) *Howard v. Woodward*, 34 L. J. Ch. 47; *Gravelly v. Barnard*, 18 Eq. 518; *London and Yorkshire Bank v. Pritt*, 56 L. J. Ch. 987; *National Provincial Bank of England v. Marshall*, 40 Ch. D. 112; *Jones v. Heavens*, 4 Ch. Div. 636.

(d) *Sainter v. Ferguson*, 1 Mac. & G. 286; *Carnes v. Nisbett*, 7 H. & N. 158, 778; *Young v. Chalkley*, 16 L. T. 286; *Gent v. Harrison*, 69 L. T. 307; *General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377.

(e) *Cornwall v. Hawkins*, 41 L. J. Ch. 435; *Evans v. Ware*, [1892] 3 Ch. 502.

(f) *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 C. B. 247; *R. v. Welch*, 2 E. & B. 357.

(g) *Robinson (Wm.) & Co., Ltd. v. Heuer*, [1898] 2 Ch. 451.

(h) *Wallis v. Day*, 2 M. & W. 273.

(i) *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

there are negative covenants such covenants will be enforced by means of an injunction. The leading case (k) on this subject is one where, as was pointed out by Fry, J., in *Donnell v. Bennett* (l), the affirmative and negative terms were practically co-extensive. It was a case in which a singer agreed that for three months she would sing at the plaintiff's theatre, and that during that time she would not sing for anybody else without the plaintiff's permission. Lord St. Leonards granted an injunction to restrain the defendant from singing elsewhere than at the plaintiff's theatre, though he could not enforce specific performance of the entire contract.

In a case where the defendant agreed to act as a member of the plaintiff's theatrical company for twenty-five weeks, one of the terms of his employment being that he should not act, sing, or appear publicly at any other theatre without special permission of the management, the Divisional Court granted an injunction restraining the defendant from acting elsewhere than in the plaintiff's theatre (m).

In one case (n) an injunction was granted by Malins, V.-C., although there was no negative covenant, but in a subsequent case (o) the Court of Appeal held that the Vice-Chancellor in granting the injunction proceeded upon a mistaken view of the decision in *Lumley v. Wagner*.

The decision in *Lumley v. Wagner* has been followed, but it is an anomaly which is not to be extended (p). So where the defendant entered the service of the plaintiffs for a term of ten years, from August, 1897, terminable by the plaintiffs on three months' notice, and agreed for that time not to engage himself directly or indirectly in any other business or transact any business with or for any other person or persons than the plaintiffs, and in 1898 he left the plaintiffs' service, it was held that the negative stipulations on his part were unreasonable, and ought not to be enforced by injunction so as to compel him for the remaining nine years to abstain wholly from business (q).

In these cases, therefore, an injunction will only be granted to enforce a negative covenant. Such a covenant, however, may be implied from positive covenants, but only if the Court can make out clearly and definitely some such negative agreement (r). Where a manager agreed to give "the whole of his time to the company's business," the Court refused to imply a negative agreement which

(k) *Lumley v. Wagner*, 1 D. M. & G. 604. See *Ogden v. Fossick*, 32 L. J. Ch. 73; and *Peto v. Brighton, Uckfield and Tunbridge Wells Railway Co.*, 32 L. J. Ch. 677.

(l) 22 Ch. Div. 835, at p. 840.

(m) *Grimston v. Cuninghame*, [1894] 1 Q. B. 125: see also *De Mattos v. Gibson*, 4 De G. & J. 276.

(n) *Montague v. Flockton*, 16 Eq. 189. In *Webster v. Dillon*, 3 Jur. N. S. 432, an injunction was also granted, but *ex parte*.

(o) *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

(p) *Ibid.*

(q) *Ehrman v. Bartholomew*, [1898] 1 Ch. 671.

(r) *Wolverhampton and Walsall Railway Co. v. London and North Western Railway Co.*, 16 Eq. 433; *Catt v. Tourle*, L. R. 4 Ch. 654; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799.

would enable them to grant an injunction to restrain him from giving part of his time to a rival company (s); and in another case it was held that a stipulation to "act exclusively for" the plaintiffs was not definite enough for the purpose of implying a negative stipulation not to act for any one else (t).

On the other hand, a covenant negative in form may be positive in substance, and therefore one to enforce which an injunction will not be granted (u).

When an injunction is granted to enforce a negative term of a contract, it will be conditional on the performance by the plaintiff of his part of the agreement, and will be liable to be dissolved if he fails to perform it (x).

(s) *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

(t) *Mutual Reserve Fund Life Association v. New York Life Insurance Co.*, 75 L. T. 528.

(u) *Davis v. Foreman*, [1894] 3 Ch. 654; *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413.

(x) *Stocker v. Wedderburn*, 3 K. & J. 393; *Fechter v. Montgomery*, 33 Beav. 22.

CHAPTER III.

THE DUTIES OF THE SERVANT TO THE MASTER, AND THE RIGHTS AND REMEDIES OF THE MASTER AS TO ENFORCING THE PERFORMANCE OF THEM.

1. AS BETWEEN MASTER AND SERVANT.

It is not proposed in the present work to enter upon a discussion of the moral duties of a servant towards his master, nor to discuss the propriety of employing the criminal law for the enforcement of rights arising out of a civil contract of hiring and service. Neither is it proposed at present to consider the cases in which the criminal law prescribes punishment for misconduct on the part of a servant. That part of the subject will be treated of hereafter. This chapter will be confined to a consideration of the duties which are civilly binding upon a servant, and the civil remedies open to a master who has sustained injury by the breach of such duties.

Duties of Servant to Master under Contract of Service.

In the first place it is clearly the duty of a person who has engaged to enter into the service of another, in any capacity, to fulfil his engagement by entering into such service: and if he fail to do so, without any good reason, he will be liable to an action for such breach of contract (*a*). As where a man agreed to go out to Australia in the plaintiff's ship, as surgeon, but afterwards refused to go; the plaintiff recovered damages in an action against him (*b*). Since, however, a master would rarely deem it worth his while to bring an action against a servant who had engaged to enter his service for refusing to do so, except, perhaps, in the case of actors and singers (*c*), and superior servants or skilled workmen, it will be sufficient, upon that subject, to observe that, to enable a master to sustain such an action, it would, of course, be necessary for him to prove a legally binding contract of hiring and service (*d*).

(*a*) *Cotes v. Sadler*, 2 Keb. 16.

(*b*) *Richards v. Hayward*, 2 M. & G. 574.

(*c*) *Astley v. Weldon*, 2 B. & P. 346; *Kemble v. Farren*, 6 Bing. 141; *Lumley v. Wagner*, 1 De G. M. & G. 604.

(*d*) See the preceding chapter (p. 16 *et seq.*) as to the requisites of the Contract.

So, also, it is equally clearly the duty of every person who has entered into the service of another to continue in such service during the whole time that he has contracted for, and if he depart without any good reason he will be liable to an action for so doing. Where, therefore, B. covenanted to serve A. as a journeyman for five years, and to work at the usual hours daily under a penalty of £100, but before the expiration of the five years departed out of the service, A. recovered against him in an action of debt the full sum of £100 and costs (e). In this case, also, it would be equally necessary to prove a legally binding contract of hiring and service.

But although the employers may have a right to claim damages from a servant, or to dismiss him and offer to re-employ him after an interval, e.g., for absenting himself without leave, they have no right to treat the contract of service as continuing, and to suspend him without wages for a particular period. So, following on such a suspension for one day, the workman recovered damages amounting to the day's wages which he was deprived of the opportunity of earning. In such a case the workman's proper course is to sue for damages in respect of the employer's refusal to allow him to earn wages for the period of suspension (f).

But in either of the above cases, if the servant were prevented by permanent illness from performing his contract, that would be a good defence to an action by the master (g).

Upon similar principles it has been held (h) that a contract by a musician to play at a concert on a specified day, being a contract dependent on the personal skill of the artist, is subject to an implied condition that if the musician be without his own default disabled by temporary illness from performing on the agreed day he shall be excused.

Duties of Servant during Service.

The duties of a servant to his master, during his service, must, generally speaking, depend, in a great measure, upon the nature of his employment, his master's business, and the contract he has entered into with his master. There are, however, many duties which are implied by law from the relationship of master and servant, and are binding upon all servants. Thus, as hereafter appears, every servant

(e) *Bird v. Randall*, 3 Burr. 1345; *Huttman v. Boulnois*, 2 C. & P. 513; *Messiter v. Rose*, 13 C. B. 162. In *Bowes and Partners v. Press*, [1894] 1 Q. B. 202, coal miners who refused to go down in the "cage" at the same time as non-unionists were held to have been guilty of such a breach of contract as entitled the plaintiff to substantial damages.

(f) *Hanley v. Pease and Partners, Ltd.*, [1915] 1 K. B. 698.

(g) *Boast v. Firth*, L. R. 4 C. P. 1 (an action upon a covenant in an apprenticeship deed). As to the position when the servant becomes a lunatic, see *Grove v. Johnston*, 24 L. R. (Ir.) 352.

(h) *Robinson v. Davison*, L. R. 6 Ex. 269.

is bound to obey all the lawful orders of his master, and to be honest, and diligent, in his master's business, and not to abuse his confidence in matters appertaining to his service (*i*).

Where a servant or agent is employed to do certain work for remuneration, it is an implied condition in the contract of service that he will faithfully and truly discharge his duty towards his employer. "There can be no question," said Bowen, L.J. (*k*), "that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given him in return for services which he actually performs for the third party, or whether it be given him for his supposed influence, or whether it be given him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it." Though a contract made by a servant be one which it was within the scope of his authority to make, yet it will not be binding on his employer if a bribe has been given, or the promise of a bribe made, to the servant with a view of inducing him to act otherwise than with loyalty and fidelity to his employer. Such an agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be (*l*). It is enough for the master to prove that money has been secretly paid or promised to his servant, without any evidence of the effect produced thereby; no evidence will be admissible as to the donor's motive, and the presumption that the servant or agent has been influenced by the bribe is irrebuttable (*m*).

If the person who has promised the bribe or secret commission does not fulfil his promise, the servant to whom he has promised it cannot sue to recover the amount, but the servant's principal may bring an action to enforce the promise, and it is no answer by the defendant to say that he saw no harm in what he had done (*n*). If, however, the money should have been paid over to the servant, his master becomes immediately entitled to it, whether he afterwards elect to adopt or to

(*i*) See *Robb v. Green*, [1895] 2 Q. B. 1, 315.

(*k*) *Boston Deep Sea Fishing and Ice Co. v. Ansell*, 39 Ch. D. 339; so in *Williamson v. Hine*, [1891] 1 Ch. 390, it was held that a broker, who was appointed managing owner of a ship, was not entitled to keep a commission on obtaining charters for the ship, as the obtaining of charters for the ship was part of his duty as managing owner. See also *Morison v. Thompson*, L. R. 9 Q. B. 480; *Eden v. Ridsdale's Railway Lamp, &c., Co.*, 23 Q. B. D. 368.

(*l*) *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.

(*m*) *Shipway v. Broadwood*, [1899] 1 Q. B. 369; *Hovenden v. Millhof*, 83 L. T. 41.

(*n*) *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.

rescind the contract made on his behalf (o). The claim by the principal against his agent in such a case is a claim by a creditor against a debtor, not by a *cestui que trust* against his trustee (p).

And not only is an agent liable to refund to his principal any secret commission which he has received from the other party to the contract with his principal, but he also becomes disentitled to claim from his principal the commission which his principal has agreed to pay him for the services in which the agent has acted unfaithfully and dishonestly towards him; and if the principal has paid him that agreed commission, he may on discovering the agent's conduct bring an action for the return of what he has paid the agent (q).

The principal, in addition to recovering from the agent any bribe received by him, may also sue his agent and the briber for damages for any loss sustained by him through entering into the contract through the agent's inducement (r).

By the Prevention of Corruption Act, 1906 (6 *Edw. VII. c. 34*) certain corrupt transactions with agents in relation to the principal's affairs or business are made a criminal offence (s). It is there provided that if any agent (which term includes any person employed by or acting for another) corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person; or if any person corruptly gives or agrees to give or offers to any agent, any gift or consideration as an inducement or reward for doing or forbearing to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business (the expression "principal" including an employer) he will be guilty of a misdemeanour and liable to imprisonment or a fine or both. It is similarly an offence for any person knowingly to give to any agent, or for any agent knowingly to use with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal.

By the Prevention of Corruption Act, 1916 (6 & 7 *Geo. V. c. 64*), increased penalties are provided when the corrupt transaction was with a government department or other public body.

When the principal finds out that there has been some surreptitious dealing between his agent and the other party to the contract, he may

(o) *Panama Telegraph Co. v. India Rubber Telegraph Works Co.*, L. R. 10 Ch. 515; *Grant v. Gold Exploration and Development Syndicate*, [1900] 1 Q. B. 293.

(p) *Lister v. Stubbs*, 45 Ch. D. 1; *Powell v. Evan Jones & Co.*, [1905] 1 K. B. 11.

(q) *Andrew v. Ramsay*, [1903] 2 K. B. 635; *Hippisley v. Knee Brothers*, [1905] 1 K. B. 1.

(r) *Mayor, &c., of Salford v. Lever*, [1891] 1 Q. B. 168.

(s) See Chitty's Statutes, tit. "Criminal Law." The consent of one of the Law Officers is necessary for a prosecution under the Act.

elect to have the contract rescinded, if it has not been carried out; or he may have such other adequate relief as the Court may think right to give him; or he may elect to confirm the contract (*t*). But his confirmation will not be binding upon him unless it is shown that a full disclosure of all material facts entitling him to repudiate the contract was made to him before his alleged confirmation (*u*).

Every servant, moreover, is bound to take due and proper care of his master's property entrusted to him; and if guilty of negligence, whereby his master's property is injured, he will be liable to an action (*x*); but he is not obliged to preserve his master's property at all adventures (*y*). In an old case (*z*), therefore, where a carrier brought an action against his servant for losing goods, it was held that the action would not lie, Holt, C.J., saying, that "There ought to be a negligence shown in the servant to make him liable to this action, for this amounts only to a bailment of goods, where, if thieves break in and steal them, he shall not answer it." And a servant entrusted with money would not be liable to his master if robbed of it (*a*).

But if guilty of fraud or misfeasance whereby his master is damnified, the servant would be liable to an action at the suit of his master. Thus, where (*b*) the plaintiff covenanted with J. S. not to import certain goods, and the defendant, being the plaintiff's servant, and knowing thereof, imported the said goods, whereby the plaintiff broke his covenant, and was sued by J. S., who recovered damages against him, it was held that the servant was bound to indemnify his master, although it was not alleged that the servant imported the goods *with intent to damnify* his master. And where (*c*) a merchant, on going abroad, trusted his servant to receive in his absence all goods that should arrive for him, and to pay the duties upon them, but the servant landed some without paying the duties, whereby they became forfeited to, and were seized on behalf of, the Queen, it was held that the merchant might maintain an action on the case against the servant for this malfeasance. And so it is said, that if a servant that drives his master's plough, by his negligence suffers the cattle to perish, an action upon the case lies against him (*d*). And if a man deliver a horse to his servant to go to market, or a bag of money to carry to London, which he neglects to do, the master may have an action of account or detinue against him (*e*). And a servant who induces an

(*t*) *Panama Telegraph Co. v. India Rubber Telegraph Works Co.*, L. R. 10 Ch. 515; *Smith v. Sorby*, 3 Q. B. D. 552, note; *Whaley Bridge Printing Co. v. Green*, 5 Q. B. D. 109.

(*u*) *Bartram v. Lloyd*, 90 L. T. Rep. 357.

(*x*) *Countess of Salop v. Crompton*, Cro. Eliz. 777, 784.

(*y*) Bac. Abr. "Master and Servant" (M. 1); *Nickson v. Brohan*, 10 Mod. 109.

(*z*) *Savage v. Walthew*, 11 Mod. 135.

(*a*) *Walker v. British Guarantee Association*, 18 Q. B. 277.

(*b*) *Hussy v. Pacy*, 1 Lev. 188.

(*c*) *Lewson v. Kirk*, Cro. Jac. 265.

(*d*) 7 Hen. IV. 14; Brooke's Abr. Action sur le case, 34.

(*e*) 21 Hen. IV. 14; Bac. Abr. "Master and Servant" (M.).

apprentice to leave his master's service is liable to an action for so doing (f).

Duties of Servant after leaving Employment.

Unless it be contrary to some express term of his employment (g), a servant, after leaving service, may lawfully set up a business of the same nature as that carried on by his late master, and in the same locality; and, provided that he acts fairly, there is no reason why he should not deal with persons who were customers of his late master (h), and so compete with him in business. But it is an implied term of the contract between a master and his servant that confidential information received by the servant to advance his master's business, and materials obtained by him on his master's behalf, in the course of his service, shall not be used by him after the termination of his service in such a way as to prejudice his master's interests (i). So where (k) the Court appointed a receiver and manager of a business and a former clerk of the firm sent a circular to the customers of the firm containing statements amounting to a libel upon the business, and at the same time soliciting their custom for his own business, and refused to give an undertaking not to repeat the offence, he was committed to prison for contempt of Court.

And where (l) canvassers had been employed to obtain advertisements for a directory, an injunction was granted to restrain them from using for the purposes of any other publication the materials which, while in the plaintiff's employment, they had obtained for the purpose of his publication.

So, too, where (m) the defendant, while employed by the plaintiff as manager of his business, copied a list of names and addresses of his master's customers with the intention of using it for the purpose of soliciting orders from them after leaving the plaintiff's service and setting up business on his own account, it was held that this was a breach of an implied term of the contract of service that the servant

(f) *Turner v. Robinson*, 5 B. & Ad. 789; and see Grot. lib. 3, cap. 7, sect. vi. 5.

(g) *Ante*, p. 48.

(h) *Re Irish*, 40 Ch. D. 49; compare *Helmore v. Smith* (2), 35 Ch. D. 449.

(i) *Morison v. Moat*, 9 Hare, 241; *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413, 422.

(k) *Helmore v. Smith* (2), 35 Ch. D. 449.

(l) *Lamb v. Evans*, [1893] 1 Ch. 218, in which some doubt was thrown upon the decision of Sir George Jessel, M.R., in *Reuter's Telegram Co. v. Byron*, 43 L. J. Ch. 661.

(m) *Robb v. Green*, [1895] 2 Q. B. 315. In *Summers & Co., Ltd. v. Boyce & Kinmond*, 97 L. T. 505, the defendant was restrained from making use of a list of customers and the terms of business of his former employers in breach of an express agreement. In *Louis v. Smellie*, 73 L. T. Rep. 226, the plaintiff obtained damages from the defendant, formerly his servant, and also an injunction restraining him from using any copies or extracts made from the plaintiff's register of agents, or any memorandum made by the defendant when in the plaintiff's employ relating to any person named in the books.

will act with good faith towards his master, and that the defendant was liable in damages for any loss caused to the plaintiff by reason of such breach.

Similarly, an ex-servant was restrained by injunction from using, in breach of his implied obligation, his former employers' secret method or process of manufacture, knowledge of which was obtained by him during his employment with the plaintiffs (n).

And Kekewich, J., granted an injunction restraining the defendant from publishing or communicating to any person a table of dimensions of engines made by the plaintiff, which table the defendant had compiled, without the plaintiff's knowledge, during his apprenticeship to the plaintiff (o).

Indemnity by Servant for Consequences of his Negligence.

A servant is also liable to an action at the suit of his master, where a third person has brought an action, and recovered damages against the master, for injuries sustained in consequence of the servant's negligence or misconduct; and in such action against the servant, the verdict against the master, in the action brought against him, is evidence as to the *quantum* of damages, though not as to the fact of the injury (p).

Upon this principle, under sect. 28 of the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), which empowers justices to award compensation not exceeding £10 to a person aggrieved by furious driving, &c., and to order the proprietor of the carriage, the driver or conductor of which has caused the injury, to pay the compensation, the proprietor is enabled to recover the same in a summary way before the justice from the driver or conductor through whose default such sum shall have been paid.

But in one case a very strong opinion was expressed (though it became unnecessary to decide the question), that the proprietor of a newspaper, who has been convicted upon a criminal information and fined for the publication of a libel inserted in the paper without his knowledge or consent by the editor, cannot recover, in an action against the editor, the damages he has sustained by such conviction (q).

(n) *Amber Size and Chemical Co., Ltd. v. Menzel*, [1913] 2 Ch. 239. See also *Alpertons Rubber Co. v. Manning*, 86 L. J. Ch. 377.

(o) *Merryweather v. Moore*, [1892] 2 Ch. 518.

(p) *Green v. New River Co.*, 4 T. R. 589. It was upon this ground that formerly in an action against a master for an injury caused by the negligence of his servant, the servant was not a competent witness for his master without a release: *Yeomans v. Legh*, 2 M. & W. 419.

(q) *Colburn v. Patmore*, 1 Cr. M. & R. 73; see the note at the end of the case. See also *Campbell v. Campbell*, 7 Cl. & Fin. 166; note to *Lampleigh v. Braithwaite*, 1 Sm. L. C. 141; *Shackell v. Rozier*, 2 Bing. N. C. 634. The question, however, could hardly arise since the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7; *vide post*, Chap. V., p. 200.

Duty to Account.

A servant or other agent who has received money from or on account of his master or principal is generally speaking accountable to him, and him only. The duty of an accounting party is to be constantly ready with his accounts, and if the accounts show that he has money which he ought to pay over, he ought also to be constantly ready to pay. It has therefore been held (r) that an agent who was bound to pay over money to his principal when requested so to do, was chargeable in an action for money had and received with interest on the amount so received from the date of the refusal to pay it over.

And time will not begin to run under the Statute of Limitations until a demand by the master for his money has been refused by the servant. Lapse of time is no bar in the case of an express trust of personal property whether created verbally or by conduct, and a person standing in a fiduciary relation to another is to be dealt with as an express trustee (s). Thus where a barrister filed a bill to recover from the assets of a deceased clerk the amount of fees which the clerk had received and not paid over, Stuart, V.-C., said that the clerk was under the duty of faithfully, diligently and accurately accounting, when called upon, to his principal, and that the money being considered as money of the employer in the hand of his confidential agent, the Statute of Limitations could not be set up as a defence (t). And the same rule applies where money has been entrusted by the owner to another person for safe custody, the receiver of the money having been held to stand in a fiduciary relation to the owner (u).

In a claim by a master against his servant for money or goods, the servant is generally considered to be estopped from setting up the title of any other person, or asserting the *jus tertii*, as it is sometimes expressed, in opposition to the title of his master or principal (x).

Upon this principle where a farm bailiff, having (wrongfully after he was discharged) received payment for some corn of his master's, paid the money into his own private account at his bankers, it was held that it was not competent to the bankers to set up the master's right to the money, as they were accountable to their customer (y).

And so in equity, an agent to receive for the use of his principal cannot, by mere notice, be converted into a trustee for a third

(r) *Harsant v. Blaine, Macdonald & Co.*, 56 L. J. Q. B. 511, following *Pearse v. Green*, 1 Jac. & W. 135.

(s) *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Burdick v. Garrick*, L. R. 5 Ch. 233; *North American Land and Timber Co. v. Watkins*, [1904] 2 Ch. 233.

(t) *Teed v. Beere*, 28 L. J. Ch. 782; *Earl of Hardwicke v. Vernon*, 14 Ves. 504.

(u) *Re Tidd, Tidd v. Overell*, [1893] 3 Ch. 154.

(x) *Dixon v. Hamond*, 2 B. & Ald. 310; *Roberts v. Ogilby*, 9 Price, 269; *Gosling v. Birnie*, 7 Bing. 339; *White v. Bartlett*, 9 Bing. 378; *Holl v. Griffin*, 10 Bing. 246; *Sims v. Brittain*, 4 B. & Ad. 375; *Kieran v. Sandars*, 6 A. & E. 515; *Ireland v. Thomson*, 4 C. B. 149, 171.

(y) *Tassell v. Cooper*, 9 C. B. 509.

person (z); and an agent employed by a trustee is *primâ facie* accountable to him only, and not to the *cestui que trust* (a). Upon similar principles a sub-agent is accountable to the superior agent, by whom he was employed, and not to the principal (b).

The above-mentioned estoppel, however, does not operate where the title of the master or principal accrued fraudulently or tortiously (c), or under a defeasible contract, which has actually been defeated (d). And in such cases the servant or agent has been allowed to set up the *jus tertii* in opposition to the claim of his master or principal. Where he can set up the *jus tertii*, he must, of course, show a *complete* title in such third person (e). If it has not been asserted, or has been abandoned, by such third person, the servant or agent cannot rely upon it (f).

The question as to how far a servant may rely upon his accountability to his master, and the maxim *Respondeat superior*, in opposition to the claims of third parties, will be treated of in a subsequent chapter. The cases, however, in which that question arose must be carefully distinguished from those in which the action is brought by the master; as a third person, who has a good title to goods, may, in general, recover them from the servant, notwithstanding the bailment (g).

Where a servant is in the habit of receiving money for the use of his master, and, by the established course of dealing, pays it over to his master from time to time, without any written vouchers passing between them, then the presumption of law is, that all sums so received by the servant are regularly paid over to the master. Therefore, where there has been such a course of dealing, in an action by the master against the servant for money had and received, it is not enough for the master to prove that sums have been received by the servant to his use; but the onus lies upon him to prove by positive evidence that the servant has not duly accounted with him (h).

Remedy for Breach of Contract of Apprenticeship.

If the father joins in a contract of apprenticeship, an action will lie against him in respect of the apprentice's breach of covenant (i), and

(z) *Nickolson v. Knowles*, 5 Madd. 47; see *Crawshay v. Thornton*, 2 Myl. & Cr. 1; *Suart v. Welch*, 4 Myl. & Cr. 305; *Fyler v. Fyler*, 3 Beav. 558.

(a) *Myler v. Fitzpatrick*, 6 Madd. 360. See also *Hunt v. Maniere*, 34 L. J. Ch. 142.

(b) *Cartwright v. Hateley*, 1 Ves. 292; *Pinto v. Santos*, 5 Taunt. 447; *Sims v. Brittain*, 4 B. & Ad. 375; *Baron v. Husband*, 4 B. & Ad. 611; *Ireland v. Thomson*, 4 C. B. 149, 171; *Cobb v. Becke*, 6 Q. B. 930; *Robbins v. Fennell*, 11 Q. B. 248.

(c) *Hardman v. Willcock*, 9 Bing. 382, note; *Cheeseman v. Exall*, 6 Ex. 341.

(d) *Murray v. Mann*, 2 Ex. 538.

(e) *Crosskey v. Mills*, 1 Cr. M. & R. 298.

(f) *Betteley v. Reed*, 4 Q. B. 511.

(g) *Ogle v. Atkinson*, 5 Taunt. 759; see *Cheeseman v. Exall*, 6 Exc. 341; *Thorne v. Tilbury*, 3 H. & N. 534.

(h) *Evans v. Birch*, 3 Campb. 10.

(i) *Branch v. Ewington*, 2 Doug. 518.

it is no answer that the apprentice avoided the contract after coming of age (*k*). But it is an answer that the master has ceased to carry on the trade to which the apprentice was bound (*l*). The damages recoverable by the master for the breach of a covenant contained in a subsisting indenture of apprenticeship are limited to damages up to the time of the issue of the writ and do not include prospective damages in respect of the loss of service for the whole term (*m*).

In an action by the father of an apprentice against the master for not instructing the apprentice, it is a sufficient answer that the latter, by absenting himself (*n*), or by refusing to be taught (*o*), made it impossible for the master to perform his covenant.

An apprentice who has enlisted in the regular forces may be claimed by his master under conditions contained in the Army Act, 1881 (*p*). This provision is applied to the Territorial Force by the Territorial and Reserve Forces Act, 1907 (*q*).

Under powers contained in the Employers and Workmen Act, 1875 (*r*), disputes between an apprentice and his master, arising out of or incidental to their relations as such, may be determined by a Court of summary jurisdiction.

Chastisement of Servant.

It is conceived, notwithstanding passages which may be found in the books apparently to the contrary (*s*), that no master (*t*) would be justified by the law of England even in moderately chastising (*u*) a hired servant of full age for dereliction of duty; and that where the books speak of a master being justified in moderately chastising his servant or apprentice, they must be taken to apply only to the case

(*k*) *Cuming v. Hill*, 3 B. & Ald. 59.

(*l*) *Ellen v. Topp*, 6 Exch. 424; *Eaton v. Western*, 9 Q. B. D. 636.

(*m*) *Lewis v. Peachey*, 31 L. J. Ex. 496; *Russell v. Shinn*, 2 F. & F. 395.

(*n*) *Hughes v. Humphreys*, 6 B. & C. 680.

(*o*) *Raymond v. Minton*, L. R. 1 Ex. 244.

(*p*) 44 & 45 Vict. c. 58, s. 96.

(*q*) 7 Edw. VII. c. 9, s. 10 (1).

(*r*) 38 & 39 Vict. c. 90.

(*s*) 1 Hawkins, P. C. lib. i. cap. 29, sect. 5, cap. 60, sect. 23; 3 Salk. 47; Burn's Justice, "Servant," sect. 9; Bac. Abr. "Master and Servant" (N.); Hale's Hist. P. C. 454. The cases of Villenage, 9 Rep. 76 a; *Anon.*, 2 Mod. 167, would not apply to a hired servant. See Hob. 99; F. N. B. 168 P.; and Puff. de Off. Hom. ac Civ. lib. 2, cap. 4, sect. 2; and M. Barbeyrac's Note to Puff. Law of Nature and Nations, b. 6, c. 3, s. 4, note 1; and Grot. lib. 2, cap. 26, s. 3.

(*t*) The master of a ship, however, has by law authority, in case of disobedience or disorderly conduct, to correct the mariners in a reasonable manner. See *The Agincourt*, 1 Hagg. 271; *Watson v. Christie*, 2 B. & P. 224; *Murray v. Moutrie*, 6 C. & P. 471; *R. v. Leggett*, 8 C. & P. 191; *Edward v. Trevellick*, 4 E. & B. 59: as to Passengers, *Noden v. Johnson*, 16 Q. B. 218; steward suspected of felony, *Broughton v. Jackson*, 18 Q. B. 378. The case of mariners on board ship seems to be exceptional, but it is not confined to cases where the vessel is at sea: *Lamb v. Burnett*, 1 Cr. & J. 291.

(*u*) In *Latter v. Braddell*, 50 L. J. Q. B. 166, 448, a housemaid, who was alleged to be pregnant, brought an action of assault against her master and mistress for causing her to be examined by a doctor, but failed from not proving non-consent. Her action against the doctor also failed.

of a servant or apprentice under age (*x*); and the only civil (*y*) remedies a master has for idleness, disobedience or other dereliction of duty, or breach of contract on the part of a servant are, to bring an action against him (*z*), or, as Puffendorf expressed it (*a*), "to expel the lazy drone from his family, and leave him to his own beggarly condition" (*b*).

Discharge of Servant.

It is difficult to lay down any general rule as to what causes will justify the discharge of a servant, which shall comprise and be applicable to all cases: since whether or not a servant in any particular case was rightfully discharged must of course often depend upon the nature of the services which he was engaged to perform and the terms of his engagement (*c*). It would seem, however, that the cause of discharge must be somehow connected with the duties of the service, *e.g.*, a clerk could not be discharged because he could not drive; he might fairly say *non hæc in fœdera veni*. In fact the question in what case and upon what grounds an employer has the right to discharge a person employed by him has only been considered in modern times, and is not fully settled (*d*). It is conceived, however, that, according to the decisions upon the subject, the discharge of a servant without notice may be justified for the following causes:

- I. Wilful disobedience of any lawful order of his master.
- II. Gross moral misconduct, whether pecuniary or otherwise, which is inconsistent with the fulfilment of his conditions of service.
- III. Negligence in business, or conduct calculated seriously to injure his master's business.
- IV. Incompetence, or permanent disability from illness.

It is proposed to treat of each of these separately. But it may be first mentioned that if there be any circumstance in existence at the time of the dismissal of the servant which would have justified the master in discharging him, it is immaterial whether it was alleged by the master, or even known to him, at the time. If an action for wrongful dismissal be afterwards brought against him, he may justify

(*x*) 1 Bl. Comm. 428; 2 Kent's Comm. 211; F. N. B. 168, L. 2, where it is said that battery of a servant is a good cause of departure. In pleading a justification of *moderate correction* of an apprentice, it was not usual to state that he was under age: 3 Ch. Pl. 321. See *Gylbert v. Fletcher*, Cro. Car. 179; *Penn v. Ward*, 2 Cr. M. & R. 338; *Phillips v. Clift*, 4 H. & N. 168.

(*y*) See *post*, Chap. VIII., as to criminal proceedings.

(*z*) F. N. B. 167; Dalt. Just. c. 58.

(*a*) Puff. on the Law of Nature and Nations, b. 6, c. 3, s. 4.

(*b*) In the present day no one would attempt to justify beating a servant for dereliction of duty, but Macaulay, Hist. Eng. vol. i. p. 424, says that in the 17th century masters well horn and bred were in the habit of beating their servants.

(*c*) *Horton v. M'Murtry*, 5 H. & N. 667.

(*d*) Per Lord Wensleydale in *Lomax v. Arding*, 10 Exc. 736. As to the right of a master to open letters addressed to a discharged manager, see *Stapleton v. Foreign Vineyard Association*, 12 W. R. 976; *Hermann Loog v. Bean*, 26 Ch. D. 306.

the dismissal by proof of any facts that would have supported it at the time (e). But if a master, on discovering that his servant has been guilty of misconduct which would justify a dismissal, yet elects to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned (f). If a servant who is rightfully discharged refuse to quit his master's premises, his master would be perfectly justified in turning him out by force (g).

I. Wilful disobedience of any lawful order of his master.

Where (h) a yearly servant to a farmer, who usually breakfasted at five a.m. and dined at two, one day refused to go with the horses to the marsh, which was a mile off, before dinner, dinner being then ready, saying that he had done his due, and would not go till he had had his dinner, whereupon his master told him to go about his business, and he went accordingly without offering to obey his master's orders; Lord Ellenborough held that the master was justified in dismissing him.

So where (i) the plaintiff, who had agreed with the defendant (under 5 & 6 Will. IV. c. 19, ss. 2, 3) to serve as carpenter's mate of a vessel during a South Sea voyage, during the voyage mutinously refused to work the ship, except to an English port, whereupon he was put on shore at Java, and discharged, the defendant was held to be justified in discharging him.

Again it has been held (k), that a master was justified in dismissing a housemaid who persisted in leaving his house contrary to his orders, although she went to visit a sick and dying mother; Parke, B., saying: "It was laid down by Lord Ellenborough, in *Spain v. Arnott* (l), and by me in *Callo v. Brouncker* (m), and confirmed by the Court of Queen's Bench in *Amor v. Fearon* (n), that the wilful disobedience of

(e) *Baillie v. Kell*, 4 Bing. N. C. 638; *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171; *Spotswood v. Barrow*, 5 Ex. 110, in which the Court did not follow *Cussons v. Skinner*, 11 M. & W. 161; *Cowan v. Milbourn*, L. R. 2 Ex. 230; and see the directions to the jury given by Alderson, B., in *Willets v. Green*, 3 C. & K. 59.

(f) *Phillips v. Foxall*, L. R. 7 Q. B. 666, at p. 680; *Boston Deep Sea Fishing and Ice Co. v. Ansell*, 39 Ch. D. 339, at p. 358. But "if the master accepts the servant's denial of guilt, and honestly comes to the conclusion that the servant is innocent, then, whatever the master's credulity, the case does not come within these authorities, since no man can condone a wrong which he does not believe was committed upon him"; *Federal Supply and Coal Storage Co. of S. Africa v. Angehrn*, 103 L. T. 150, at p. 152.

(g) *Donaldson v. Williams*, 1 Cr. & M. 345; *Mackay v. Ford*, 5 H. & N. 792. Where the manager of an hotel, who by the terms of his employment was to be allowed with his wife and family to reside on the premises, refused to leave the hotel upon his summary dismissal for continued intemperance, and sued his employer, the defendant obtained an interlocutory injunction which restrained the plaintiff from disturbing him in his possession of the premises: *Collison v. Warren*, [1901] 1 Ch. 812.

(h) *Spain v. Arnott*, 2 Stark. 256; *Callo v. Brouncker*, 4 C. & P. 518.

(i) *Renno v. Bennett*, 3 Q. B. 768.

(k) *Turner v. Mason*, 14 M. & W. 112.

(l) 2 Stark. 256.

(m) 4 C. & P. 518.

(n) 9 A. & E. 548.

any lawful order of the master is a good cause of discharge. Here the plea discloses a perfectly lawful order, namely, that the defendant (*sic*) should not absent herself from the service during a night, and the plaintiff's disobedience thereto. Then the question is, whether the replication discloses sufficient ground of excuse for such disobedience. *Primâ facie* the master is to regulate the times when his servant is to go out from, and return to, his house. Even if the replication showed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her. But the replication states nothing to show that the defendant had any notice or knowledge of the mother's illness."

And similar principles were laid down in a case (o) in which the plaintiff was engaged as a waggoner to the defendant, but during the harvest worked in the field generally. The practice was, during harvest, to work till eight o'clock in the evening. The plaintiff refused to work till that hour, not as being an unreasonable hour, or as not being within the terms of his contract, but because strong beer of good quality was not allowed to him, according to a custom which he alleged to exist, but could not prove, the beer supplied being, as he contended, very bad small beer, not so good as water; whereupon the defendant refused any longer to employ the plaintiff, and took him before a magistrate, who discharged him, and he brought his action against the defendant. But it was held that the defendant had a right to discharge him, and must be taken to have exercised that right by ordering him not to return, taking him before a magistrate, and acquiescing in the magistrate's order of discharge.

So, again, in the case of a messman to a regiment. The plaintiff was appointed messman by an agreement between himself and the mess committee, of which the defendant was the president, and as such the defendant signed the agreement. The committee was changed. One day, in consequence of an altercation between himself and another servant, the plaintiff declared that he would have nothing more to do with the mess and refused to send up dinner. After some minutes' delay the colonel of the regiment went downstairs, and asked the plaintiff if he meant to send up dinner; the plaintiff said he would not, and used language not respectful, upon which the colonel threatened to send for a file of soldiers and put him under arrest. The plaintiff then served dinner, after half an hour's delay. Next day the mess committee held a meeting and dismissed the plaintiff. He tendered an apology, which they refused to accept. He then brought his

(o) *Lilley v. Elwin*, 11 Q. B. 742, 756.

action for wrongful dismissal. Both Cockburn, C.J., and the jury thought there was just ground of dismissal (*p*).

But a mere obstinate refusal to work will not, of itself, justify the dismissal of a servant, as it might be an obstinate refusal to do an unlawful act (*e.g.*, to work at trade on Sunday) (*q*). Again, where the plaintiff, who had been engaged by the defendant as a "lace buyer," had been dismissed by him on the ground of disobedience to an order given by the defendant to the plaintiff to fold some lace on cards, it was held that it was properly left to the jury to say whether the order was one which the plaintiff, assuming his engagement to have been as a "lace buyer," was bound to obey. In the words of Erle, C.J.: "The question which was before the jury was, whether the order which the plaintiff declined to obey was a lawful order within the contract of hiring. If he was hired as a buyer, he was not bound to perform services not properly appertaining to that character" (*r*). And in *Turner v. Mason* (*s*), *supra*, Alderson, B., said: "There may, undoubtedly, be cases justifying a wilful disobedience of such an order; as where the servant apprehends danger to her life, or violence to her person, from the master; or where, from an infectious disorder raging in the house, she must go out for the preservation of her life."

II. Gross moral misconduct, whether pecuniary or otherwise, inconsistent with the fulfilment of the conditions of service.

"There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal" (*t*).

So, "if a servant robs his master, he may, although a month's notice be required, dismiss him without any notice" (*u*).

And "if a servant habitually embezzle his master's property, the amount embezzled is wholly immaterial; and although the arrear of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to anything" (*x*).

So also "the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud" (*y*). And where (*z*) the accountant to a company received money for which he did not account, and falsified the accounts

(*p*) *Churchward v. Chambers*, 2 F. & F. 229.

(*q*) *Jaquot v. Bourra*, 7 Dowl. 348.

(*r*) *Price v. Mouat*, 11 C. B. (N. S.) 508.

(*s*) 14 M. & W. 112, at p. 118.

(*t*) *Clouston & Co., Ltd. v. Corry*, [1906] A. C. 122, 129.

(*u*) Per Park, J., in *Cunningham v. Fonblanque*, 6 C. & P. 44, at p. 49.

(*x*) *Brown v. Croft*, 6 C. & P. 16, note; and see *Spotswood v. Barrow*, 5 Ex. 110.

(*y*) *Phillips v. Foxall*, L. R. 7 Q. B. 666, per Blackburn, J., at p. 681.

(*z*) *Baillie v. Kell*, 4 Bing. N. C. 638.

furnished by him, his employers were held justified in dismissing him, although they did not assign that as the cause of his dismissal.

So also it has been held that a clerk and traveller who lived and boarded in his master's house was rightfully dismissed for assaulting his employer's maid-servant with intent to ravish her (a). And it is said that a maid-servant being with child (b), or a man-servant being the father of a bastard child of a female servant in the same family (c), is a good cause of discharge.

Drunkenness may also be a justifiable cause of discharge, but "there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts, and is a question of fact" (d).

III. Negligence in business or conduct calculated seriously to injure his master's business.

It is not any isolated instance of negligence on the part of a servant that will justify his being dismissed without notice (e). In some cases, however, negligence in comparatively small matters may become habitual, and this habitual negligence may become so serious as to form a good ground to the master for dismissing the servant.

Upon this ground, in an action for a month's wages by a servant who was dismissed without warning, on the ground that he was negligent in his conduct, frequently absent when his master wanted him, and often slept out at nights, Lord Kenyon held that the plaintiff was not entitled to recover on account of his misconduct (f). In another case (g), Lord Wensleydale said that for "habitual neglect" the defendant was at liberty to part with the plaintiff.

But a single act of negligence may in some circumstances justify dismissal. The question is one of fact and degree depending on the circumstances of each particular case. A master has therefore (h)

(a) *Atkin v. Acton*, 4 C. & P. 208.

(b) *R. v. Bampton (Inhabitants)*, Cald. 11. *Connors v. Justice*, 13 Ir. C. L. R. 451, 457, where Monahan, C.J., said: "Can any one doubt that chastity is an essential requisite in a female domestic servant? And can any one doubt that the master or mistress of a family would be justified in dismissing without the usual month's notice a female domestic servant for unchaste conduct?"

(c) *R. v. Welford (Inhabitants)*, Cald. 57.

(d) *Clouston & Co., Ltd. v. Corry*, [1906] A. C. 122, 129. See also *Speck v. Phillips*, 5 M. & W. 279; *Wise v. Wilson*, 1 C. & K. 662.

(e) *Edwards v. Levy*, 2 F. & F. 94.

(f) *Robinson v. Hindman*, 3 Esp. 235.

(g) *Callo v. Brouncker*, 4 C. & P. 518.

(h) *Baster v. London and County Printing Works*, [1899] 1 Q. B. 901.

been held to have been justified in dismissing a servant for his neglectful management of a printing press on one occasion by which serious damage was caused to the machine.

So, too, a single wrongful act inconsistent with the duty of the servant to his master, and the continuance of confidence between them, will justify his being dismissed. So it was held that a company were justified in dismissing their manager, who on one occasion in which he had made a contract on behalf of his employers for the building of some fishing smacks, had received a commission from the builders (*i*). “The rule of law,” said Lord Esher, M.R. (*k*), “is that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him. . . . What circumstances will put a servant into the position of not being able to perform in a due manner his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances which never have yet occurred, will occur, which also will fall within that proposition. But if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant’s conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him.” The Court in this case held that a firm of merchants were justified in dismissing a servant whom they had engaged for ten years as their confidential clerk, whom they discovered to have been speculating in differences upon the Stock Exchange to the extent of many hundreds of thousands of pounds.

The servant who has been dismissed for a dishonest transaction, such as taking a secret profit in violation of his duty, may, if he can, prove the righteousness of the transaction. But once a *primâ facie* case of misconduct of this kind is established, the burden of proof is shifted to the servant, and if he fails to discharge that burden satisfactorily, the *primâ facie* case must prevail (*l*).

Upon these principles, the foreman to silk manufacturers was held to be rightly discharged (and, moreover, liable to an action) for advising and assisting an apprentice to quit their service and go to America (*m*); and the clerk to a company was held to be rightly dismissed for entering in a minute-book a protest, in his own handwriting, against a

(*i*) *Boston Deep Sea Fishing and Ice Co. v. Ansell*, 39 Ch. D. 339.

(*k*) *Pearce v. Foster*, 17 Q. B. D. 536.

(*l*) *Federal Supply and Cold Storage Co. of S. Africa v. Angehrn*, 80 L. J. P. C. 1.

(*m*) *Turner v. Robinson*, 5 B. & Ad. 789.

resolution of the directors calling a meeting to appoint his successor, as such an act was inconsistent with his service (n).

So in an action by the acting manager of Covent Garden Theatre, for wrongful dismissal from his situation, &c. (o); to which, amongst other pleas, the defendant pleaded that the plaintiff's conduct was calculated to prejudice the interests of the theatre: Vaughan, J., said: "It is a question of fact, whether the plaintiff was so conducting himself as that it would have been injurious to the interests of the theatre to have kept him. If he was, I should have no difficulty in saying that it would be good ground of dismissal."

Again, where (p) the defendant, a master-builder, dismissed the plaintiff, a journeyman carpenter, for poaching on the premises of Mr. T., a gentleman for whom the defendant was working, and at whose premises the plaintiff was engaged working; Coleridge, J., in leaving the question to the jury whether or no this was just ground of dismissal, said: "In dealing with this question, I think that you ought to consider what Mr. T. had a right to expect from the defendant and his men. If a gentleman engages a tradesman who has several workmen under him, he has a right to expect that the workmen will conduct themselves well. It is said that they did no damage; but I do not think that it entirely depends on that, because it might have been, that Mr. T. might have said, 'I will not allow the workmen to go into my garden,' and if they had done so, they would have done no actual damage; but still, if the defendant employed persons who acted in that way, he would soon find that he was injured in his business, and would lose his custom, because gentlemen would not engage him."

So a wine merchant (q) was held justified in dismissing a clerk, at a yearly salary, who also, at certain periods, received a portion of the profits (but this, as the master alleged, was a mere gratuity), for claiming to be a partner, as he thereby put himself in a position inconsistent with that of a servant.

And it was said by Lord Abinger (r) that the accepting of an undrawn bill of exchange, in blank, by the manager of a cotton company, was wrong, and would have been a very justifiable cause of discharging him the next day after it was discovered.

But it has been held (s) that a schoolmaster was not justified in

(n) *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171.

(o) *Lacy v. Osbaldiston*, 8 C. & P. 80.

(p) *Read v. Dunsmore*, 9 C. & P. 588.

(q) *Amor v. Fearon*, 9 A. & E. 548. See also *Mercer v. Whall*, 5 Q. B. 447, where, to an action of covenant by an articulated clerk against a solicitor for dismissing him, the defendant pleaded that the plaintiff conspired to induce the defendant's clients to leave him, and disclosed his professional secrets; *Hobson v. Cowley*, 27 L. J. Ex. 205, a plea that plaintiff, whilst in defendant's service, entered into negotiations for carrying on the same business as defendant without his consent.

(r) *Cussons v. Skinner*, 11 M. & W. 170. The decision in that case, however, did not turn on this point.

(s) *Fillieul v. Armstrong*, 7 A. & E. 557.

discharging the plaintiff, a teacher of French and drawing, for not returning to the school for two days after the vacation: as it did not appear that the plaintiff had been guilty of any immorality, nor that the defendant was obliged to hire another person, or that the plaintiff's department was not, in fact, adequately filled, nor that the instructions in French or drawing were impeded, or that the business of the school was suspended for a single hour.

And where (t) a surgeon by a written agreement, not under seal, agreed with the plaintiff, in consideration of a premium of £50, to take her son, a young man seventeen years old, as pupil and assistant for three years, to assist him in his studies, to allow him to attend lectures, and to provide him with board and lodging, but dismissed him in consequence of his coming home drunk about five times, and on some occasions, when he came home late, desiring the shop-boy to make up the medicines, Lord Denman, in summing up to the jury, said, "There is a great distinction between a contract of apprenticeship and a contract with a servant. A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves. This is a mixed case, something between that of apprenticeship and service. The plaintiff's son goes to the defendant to render assistance to him in his business, although he is also to pursue his studies; and as a justification of his dismissal, the defendant has pleaded not that the plaintiff's son did not perform all things on his part to be performed, but that he did things injurious to the defendant's practice, and so misconducted himself as to be dangerous to the defendant's practice as a surgeon. It is proved beyond all doubt that, on some occasions, the plaintiff's son came to the defendant's house intoxicated, but I think that alone would not justify the defendant in dismissing him. It is also proved that, on several occasions, in consequence of the plaintiff's son coming home late, he could not compound the medicines, and employed the shop-boy to do it. Now, I think, this affords matter for serious consideration, and if you think that from this conduct of the plaintiff's son real danger was occasioned to the master's business, you ought to find your verdict for the defendant, as the defendant was then, in my opinion, justified in dismissing him."

The plaintiff (u) was engaged as clerk to the defendant, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton, and in the course of his employ it was his duty to pay freight, dock dues, &c., to meet which the defendant remitted money. On one occasion the plaintiff wrote to the defendant for £140, inclosing an account of the purposes for which it was required, one of them being the payment of £30 salary due to him-

(t) *Wise v. Wilson*, 1 C. & K. 662; compare *Phillips v. Clift*, 4 H. & N. 168.

(u) *Smith v. Thompson*, 8 C. B. 44.

self. Ten days afterwards the defendant sent the plaintiff £100 in a letter, directing him to apply the money for "business purposes," and he applied £30 in payment of his own salary, whereupon the defendant discharged him, and the plaintiff brought his action for wrongful discharge. At the trial the judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper appropriation of the money, or of disobedience of orders. And it was held by the Court of Common Pleas to have been properly so left, and that the judge was not bound to tell the jury that it was not necessary, to justify the dismissal of the plaintiff, that he should have been guilty of any moral turpitude.

And where (x) the plaintiff agreed with the defendant to serve him for three years as manager of certain ironworks, at a salary of £4 per week, upon the terms that the plaintiff would during that time use his best endeavours to promote the interest of the defendant, and attend to and carry out all reasonable requests made to him by the defendant, a plea that the plaintiff did not, while he was in the defendant's employ under the agreement, use his best endeavours to promote the interest of the defendant according to the agreement, wherefore the defendant dismissed the plaintiff, and refused to pay him any salary after such dismissal, was held a good plea to an action for wrongful dismissal. In that case, Pollock, C.B., said, "Suppose the plaintiff had conducted himself on all occasions in a negligent and lazy spirit, there may be insuperable difficulty in a legal definition of the plaintiff's conduct, and yet the defendant would be justified in discharging him from his service. It would be a question of evidence."

Where, by an agreement in writing, A. was appointed surveyor or agent of B. for two years and a half, at a salary of £200 a year, and a commission on every house let by him for B., and the agreement expressly provided that under no pretence whatsoever should A. be considered B.'s agent to receive any money on his account: it was held that A.'s having received deposit money from persons to whom he had let houses for B. was a good defence to an action for dismissing A. before the end of the term (y).

The plaintiff, who was employed by the defendant to serve him in the business of a certain manufacture, and engaged to "bring all his knowledge to bear upon it," without the knowledge of his master entered into a contract with a merchant (not dealt with by his master) for the supply of certain articles used in the manufacture, the result of which was a claim to a considerable amount by the merchant against the master, who thereupon dismissed the plaintiff; it was held that the dismissal was justifiable (z).

(x) *Lomax v. Arding*, 10 Ex. 734.

(y) *Bray v. Chandler*, 18 C. B. 718.

(z) *Horton v. M' Murtry*, 5 H. & N. 667.

If, however, the servant's misconduct be not such as to go to the whole consideration of the contract on the part of the master, he will not be justified in dismissing the servant, but must, if necessary, resort to a cross action against the servant; or set up a counter-claim in answer to an action for wrongful dismissal.

Where, therefore (a), to an action for wrongfully discharging the plaintiff from the defendant's employ as European correspondent of a newspaper, at a salary, the defendant pleaded, firstly, that the engagement was made upon the terms and condition that the plaintiff should, by every steamer from Liverpool to New York, forward a letter containing European news, but plaintiff wrongfully neglected to forward any letter containing such news by several steamers that sailed from Liverpool to New York, wherefore defendant discharged him; and also, secondly, that defendant employed plaintiff upon the terms and condition that plaintiff might draw bills upon defendant for the amount of his salary as it should become due, but not for any sum not due; but plaintiff wrongfully drew on defendant and negotiated bills for sums not due, which were presented to defendant and dishonoured to the damage of defendant's credit, wherefore defendant discharged plaintiff: both pleas were held bad on demurrer, as not showing a default by plaintiff going to the whole consideration of defendant's contract. The breach of the stipulations on the part of the plaintiff did not amount to such misconduct as to authorise the defendant to discharge him. It might have been that there was no news to send; and the second plea would be satisfied by proof that the plaintiff had drawn a bill for half-a-crown too much.

IV. Incompetence, or permanent disability from illness.

Where a servant of any sort is engaged on account of his skill or peculiar ability to perform certain duties, and turns out to be perfectly unskillful and incompetent to discharge the duties for which he was hired, the master will be justified in rescinding the contract and discharging the servant. Thus (b), where in an answer to an advertisement in a newspaper for scene-painters, the plaintiff applied to the defendant, and the defendant hired the plaintiff in that capacity, but he turned out to be quite incompetent, and was discharged; it was held that such incompetence was a valid reason for discharging him, and in an action for wrongful dismissal, in giving judgment for the defendant, Willes, J. said: "Where a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—'*spondes peritiam artis*.' Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. . The public profession of

(a) *Gould v. Webb*, 4 E. & B. 933.

(b) *Harmer v. Cornelius*, 5 C. B. (N. S.) 236.

an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill (c). An express promise or express representation in the particular case is not necessary. It may be, that if there is no general and no particular representation of ability and skill the workman undertakes no responsibility. If a gentleman, for example, should employ a man that is known never to have done anything but sweep a crossing to clean or mend his watch, the employer probably would be held to have incurred all risks himself. But in the case under consideration, the correspondence shows, in addition to the implied representation, an express and particular representation by the plaintiff that he did possess the requisite skill. The next question is this: supposing that, when the skill and competency of the party employed are tested by the employment, he is found to be utterly incompetent, is the employer bound, nevertheless, to go on employing him to the end of the term for which he is engaged, notwithstanding his incompetency? This is a question upon which we have been furnished by the Bar with no authority, probably because such labour being seldom retained for a long term certain, the question has not often arisen. But it seems very unreasonable that an employer should be compelled to go on employing a man who, having represented himself competent, turns out to be incompetent. An engineer is retained by a railway company to drive an express train for a year, and is found to be utterly unskilful or incompetent to drive or regulate the locomotive; are the railway company still bound, under pain of an action, to entrust the lives of thousands to his dangerous and demonstrated incapacity? A clerk is retained for a year to keep a merchant's books, and it turns out that he is ignorant not only of bookkeeping but of arithmetic; is the merchant bound to continue him in his employment? Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct. The rule of the civil law—'*Imperitia culpæ adnumeratur*' applies. . . . So in *Spain v. Arnott* (d), Lord Ellenborough, speaking of a servant who had refused to perform his duty, says, 'The master is not bound to keep him on as a burthensome and useless servant to the end of the year'; and it appears to us that there is no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired."

The plaintiff (e) entered into an agreement to serve the defendant for

(c) See *Jenkins v. Betham*, 15 C. B. 168, 189.

(d) 2 Stark. 256.

(e) *Cuckson v. Stones*, 1 Ell. & Ell. 248; followed in *K— v. Raschen*, 38 L. T. 38, in which the plaintiff was held not to be disentitled from recovering wages for a month during which he had been absent through illness, though that illness had been caused by his own misconduct before making the contract to serve the defendant, there being no evidence that he was aware that he had in him the seeds of disease

ten years in the capacity of a brewer, and teach him to brew; and the defendant was to pay the plaintiff £20 on the execution of the agreement, to find him a house, to supply him with coals for the ten years, and to pay him the weekly sum of £2 10s. during that term. He served the defendant for some years, when he was taken ill, and was unable to attend to his work for some months, when he was again employed about the brewery, and paid as before. During his illness he was from time to time consulted by the defendant as to the mode of brewing, but was unable to do any actual work for defendant. It was held that the plaintiff was entitled to recover under it the wages for the time during which he was disabled by sickness from working; and in giving judgment, Lord Campbell said, "We concur in the observations of Willes, J., in *Harmer v. Cornelius* (f), and if the plaintiff, from unskilfulness, had been wholly incompetent to brew, or by the visitation of God he had become, from paralysis or any other bodily illness, permanently incompetent to act in the capacity of brewer for the defendant, we think that the defendant might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never be expected to return to his work, we think the defendant might have dismissed him and employed another brewer in his stead. Instead of being dismissed he returned to the service of the defendant when his health was restored; and the defendant employed him and paid him as before. At the trial the defendant's counsel admitted that the contract was not rescinded. The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that, under this contract, there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and, while the contract remained in force, we see no difference between his being so disabled for a day, or a week, or a month."

On similar principles, it has been held that the relation of master and servant is not determined merely because the workman is temporarily absent from work and in receipt of compensation for incapacity under the Workmen's Compensation Act (g).

On the other hand, the defendant had agreed to employ the plaintiff to take the chief female part in an opera which he was about to bring out, at a weekly salary for three months. The plaintiff was prevented by illness from attending the last rehearsals and the first four performances. Her illness being of a serious nature and of uncertain duration, the defendant engaged a substitute at a higher salary, and when the

when he agreed to enter the defendant's service. In *Davies v. Ebbw Vale U. C.*, 75 J. P. 533, the expression "absence through illness" in the contract of employment was held to include the period of convalescence.

(f) *Supra*.

(g) *Warburton v. Co-operative Wholesale Society, Ltd.*, [1917] 1 K. B. 663.

plaintiff tendered her services for the fifth performance, he refused to accept them. She brought an action for wrongful dismissal. The jury found that the defendant had acted reasonably in employing a substitute, and that the agreement which he had made with the substitute was a reasonable one. The Court was of opinion that it followed, as a matter of law, that the failure on the plaintiff's part went to the root of the matter and discharged the defendant (*h*).

Discharge of Apprentices.

In an ordinary apprenticeship indenture the covenants by the master are independent covenants the performance of which does not depend upon the performance by the apprentice on his part of the obligations imposed on him by the deed (*i*). The apprentice cannot, therefore, as a general rule, be discharged for misconduct, the only remedy of the master being by action on the covenants in the indenture (*k*). But an apprenticeship deed may contain a proviso or other term enabling the master to discharge the apprentice for misconduct (*l*); and where the apprentice is an habitual thief, that fact may be relied upon by the master as a good defence in an action for breach of his covenant to keep, teach and maintain the apprentice (*m*).

2. AS BETWEEN THE MASTER AND THIRD PERSONS.

A master may maintain an action against any person who deprives him of the services of his servant, either by enticing him away from his master (*n*), or by harbouring and detaining him after having been apprised of the former contract (*o*); or by beating, confining or disabling him (*p*); or by seducing a female servant (*q*). The master may also, where wages have been earned by a servant enticed away or harboured by another person, waive his right of action for such tortious act, and

(*h*) *Poussard v. Spiers*, 1 Q. B. D. 410. In *Loates v. Maple*, 88 L. T., the plaintiff, a jockey, had agreed to ride for the defendant for the flat racing seasons for three years. He met with an accident and broke his leg, by which he was prevented from riding during the second year till the month of May. The defendant did not do anything to put an end to the engagement, but in an action by the plaintiff upon the agreement it was contended on behalf of the defendant that the plaintiff's temporary incapacity to ride had *ipso facto* put an end to the contract. Wright, J., considering the nature of the employment, and the length of the term for which the agreement was made, held that the contract had not been determined by the plaintiff's temporary incapacity to ride.

(*i*) *Learoyd v. Brook*, [1891] 1 Q. B. 431, 433.

(*k*) *Winstone v. Linn*, 1 B. & C. 460; *Wise v. Wilson*, 1 C. & K. 662; *Phillips v. Clift*, 4 H. & N. 168.

(*l*) *Westwick v. Theodor*, L. R. 10 Q. B. 224.

(*m*) *Cox v. Mathews*, 2 F. & F. 397; *Learoyd v. Brook*, [1891] 1 Q. B. 431.

(*n*) *Post*, p. 86. In what cases a master is entitled to maintain litigation by his servant, without exposing himself to a charge of maintenance, see *Elborough v. Ayres*, L. R. 10 Eq. 367.

(*o*) *Post*, p. 90.

(*p*) *Post*, p. 98.

(*q*) *Post*, p. 100.

sue for the earnings of his servant. In all these cases the master's right of action arises out of the property which he has acquired, by the contract of hiring, in the labour of his servant; and in all of them, except the action for his servant's earnings, the gist of the action is the loss of service, without an allegation of which no action can be sustained by a master, however great the injury to his servant (r). Whilst, therefore, on the one hand, a mere attempt to deprive a master of the services of his servant without any damage following upon it would not give the master a right of action, so, on the other, it has been held that a master, who has recovered in an action against the servant a stipulated penalty for leaving his service, cannot maintain an action against the person who induced him to leave (s).

Of the Action for enticing away a Servant.

An indictment will not lie for enticing an apprentice or servant away from his master, it being only a private injury, which may be redressed by a civil action (t). Conspiracies or combinations to induce workmen to break their contracts of service have been held to be indictable, but the law on this subject now depends upon the provisions of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86) (u), as amended by the Trade Disputes Act, 1906 (6 Edw. VII. c. 47).

As to what sorts of service enable this action to be brought; it is no objection to such an action that the servant was only a journeyman, who worked by the piece, provided he were the plaintiff's servant, but a man who lived in his own house, and took in work for different people, could scarcely be called the journeyman of any particular master (x). And it has been held by three Judges of the Court of Queen's Bench (y),

(r) *Poley v. Osborn*, cited 10 Co. Rep. 190 b; *Hanbury v. Ireland*, Cro. Jac. 618; *Chamberline v. Harvey*, 5 Mod. 182; *Hall v. Hollander*, 4 B. & C. 660; *Grinnell v. Wells*, 7 M. & G. 1033; *Eager v. Grimwood*, 1 Ex. 61; *Davies v. Williams*, 10 Q. B. 725.

(s) *Bird v. Randall*, 3 Burr. 1346.

(t) *R. v. Daniel*, 6 Mod. 99, 182; Com. Dig. Indictment, G. 3. Under sect. 236 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it is an offence to persuade or attempt to persuade a seaman or apprentice to desert from a British ship: see *Poll v. Dambe*, [1901] 2 K. B. 579.

(u) *R. v. Rowlands*, 5 Cox, C. C. 466; *R. v. Duffield*, 5 Cox, C. C. 404. See Mr. Justice Wright's book on the Law of Criminal Conspiracies, and *Gibson v. Lawson*, [1891] 2 Q. B. 545, at p. 560. See Chitty's Statutes, title, "Societies (Trade Unions)."

(x) *Hart v. Aldridge*, 1 Cowp. 54.

(y) *Lumley v. Gye*, 2 E. & B. 216: where it was held that an action lay for seducing a dramatic performer away from plaintiff's theatre. Coleridge, J., in support of his judgment, refers to the 2nd section of the Statute of Laborers and the form of writ given by Fitzherbert, N. B. 167, B. as always reciting the statute. But the first writ given by Fitzherbert is founded upon the 3rd section of the statute, and is to recover the penalty there given to the party grieved. The other writs are against the servant, and it would hardly be contended at the present day that such actions must be confined to the class of servants referred to by the Statute of Laborers. It would seem also from the rule given in *Lutw. 1548*, that the mere recital of the statute would not show that the action lay not at common law. It is there said that

that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced, or is only *in fieri*, provided the procurement be during the subsistence of the contract, and produces damage, and that to sustain such an action it is not necessary that the employer and employed should stand in the strict relation of master and servant. Coleridge, J., however, dissented, and gave elaborate reasons for holding that the action was founded on the Statute of Laborers, and is strictly confined to cases where the employer and employed stand in such relation of master and servant as was within that statute; and that in all other cases the remedy for a breach of contract is only on the contract, and against those privy to it.

This decision of the Court of Queen's Bench was considered by the Court of Appeal in 1881 in a case (2) in which it was held that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally, and did in fact cause, an injury to such employer, although the relation of master and servant may not strictly exist between the employer and employed.

These two cases were the subject of much discussion in a case in the House of Lords (a), and the dicta of Brett, L.J., in delivering judgment in *Bowen v. Hall* on the subject of malice were disapproved. Lord Herschell said that he was satisfied that in *Lumley v. Gye* the majority of the Court regarded the circumstance that what the defendant procured was breach of contract as the essence of the cause of action; and that though the word "maliciously" was to be found in the declaration the Judges in that case did not regard the allegation as

where an action lay both at common law and by statute, if you proceed under the statute you must recite the statute, for "without rehearsal, *non patet*, whether he uses the action by the common law, *sicut potest*, or the action on the statute." It is also added, "If there were no action at common law, the statute should be rehearsed." So the recital of the statute in a writ does not *prove* that the action did not lie at common law, but only that the plaintiff is not using the action at common law in this instance. Thus leaving the matter where it was. Again, it may be asked, if this form of action is founded entirely upon the Statute of Laborers, why did it not cease when that statute was repealed, 5 Eliz., 26 & 27 Vict. c. 125? Moreover, if the judgment of Coleridge, J., is right, what becomes of the common action for seduction of a daughter and servant? Is that to be brought only in cases within the Statute of Laborers? It is notoriously otherwise. In the Year Book, Michaelmas, 39 Ed. III., fo. 37 B, it is said: "Although this action be given by statute, the writ lay at common law, and is not defeated by the statute."

(2) *Bowen v. Hall*, 6 Q. B. D. 333, in which the opinion of the majority of the Court in *Lumley v. Gye* was approved by Lord Selborne, L.C., and Brett, L.J., Lord Coleridge, C.J., dissenting.

(a) *Allen v. Flood*, [1898] A. C. 1. The real point decided in this case was that a servant had no right of action against a person who had merely informed the plaintiff's employers that most of their workmen would leave them if they did not discharge the plaintiff, although in giving this information the defendant had acted maliciously and with intent to injure the plaintiff: see *Quinn v. Leatham*, [1901] A. C. 495, where Lord Macnaghten said (at p. 508) that the headnote to *Allen v. Flood* might well have been in words used by Parke, B., in giving judgment in *Stevenson v. Newnham*, 13 C. B. 297, "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

involving the necessity of proving an evil motive on the part of the defendant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract. Lord Watson, whose opinion, said Lord Macnaghten in *Quinn v. Leathem* (b), represented the views of the majority better far than any other single judgment delivered in *Allen v. Flood*, used these words: "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to law laid down by the majority in *Lumley v. Gye*, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

In a recent case in the House of Lords (b), *Lumley v. Gye* was again held to be correctly decided. Lord Macnaghten said he thought the decision right, not on the ground of malicious intention, "but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference." And Lord Lindley said (c) that the principle involved in *Lumley v. Gye* "cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."

It is therefore now settled that malice in the sense of spite or ill-will is not the gist of an action for inducing a breach of contract; and since "all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill-feeling, it is better to drop the word malice and so avoid all misunderstanding" (d).

The motives or other causes which may be sufficient justification for the interference give rise to more difficulty. Questions on this point have generally arisen from the action taken by trade unions (e).

To support this action, it is necessary to prove that the defendant knew the person to be the plaintiff's servant (f); but not to particularise the means of enticement (g). There must also be a binding contract

(b) *Quinn v. Leathem*, [1901] A. C. 495.

(c) *Ibid.*, at p. 535.

(d) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, per Lord Lindley, at p. 255.

(e) See *post*, p. 168 *et seq.*

(f) *Fores v. Wilson*, Peake, 55.

(g) *Winsmore v. Greenbank*, Willes, 582.

of service between the servant and his first master, or the plaintiff will fail (*h*).

In an action for enticing away a servant where it appeared that the plaintiff kept a public-house, that his daughter, who was about nineteen years old, helped in the house and business; that a fictitious letter was written by the defendant as if from a relation of the girl, saying such relation was ill and asking leave for the girl to come to her; that leave was given to the girl and she went away, but instead of going to such relation went to a house of ill-fame and stopped there with the defendant, and then returned to her father's house; it was held that it was a question of fact for the jury whether when the defendant caused her to leave she was the plaintiff's servant *de facto*, and whether his acts did cause her to deny her services, that the Court as a jury held the affirmative, and that the plaintiff was entitled to succeed (*i*).

The mere circumstance that the servant is an infant, and the contract therefore voidable, will not defeat the action (*k*).

This action will not lie for inducing a servant to leave his master's service at the expiration of the time for which he was hired, although the servant had otherwise no intention of leaving his master (*l*).

It was also held by Lord Mansfield, in *Bird v. Randall* (*m*), that this action would not lie after the master has recovered from the servant a stipulated penalty for leaving the service, upon the ground, that "if the seducer or second master, who employs the servant after the servant has paid the penalty, were to be liable to damages in an action brought by the first master for so doing, this would finally fall upon the servant, and in effect be an addition to the penalty; for the second master would pay the servant for his service no more than he estimates it to be worth to him; and if he must pay a sum of money to the first master for damages for entertaining his servant, he will make his bargain with the servant in such manner as to pay him so much the less." And Lord Ellenborough said (*n*) he remembered Wilson, J., ruling the same point at Nisi Prius upon the dry authority of the former decision, though, as it seemed to him, with considerable doubts upon his mind as to the propriety of it. But Lord Ellenborough said he never could entirely comprehend the ground on which *Bird v. Randall* proceeded. "It was assumed," he said, "that the sum taken as the penalty from the servant was the extreme limit of the injury sustained by the master; but there is the doubt: for the penalty might have been so limited,

(*h*) *Sykes v. Dixon*, 9 A. & E. 693; *De Francesco v. Barnum*, 45 Ch. D. 430 (a contract of apprenticeship); and see *Gye v. Felton*, 4 Taunt. 876. See also the judgments of Lord Herschell and Lord Davey in *Allen v. Flood*, [1898] A. C. 1.

(*i*) *Evans v. Walton*, L. R. 2 C. P. 615.

(*k*) *Keane v. Boycott*, 2 Hy. Bl. 511; *Evans v. Walton*, *ubi supra*. If the contract be not for the benefit of the infant (as to which see *ante*, Chap. I.), and so is not binding on him, the action will fail: *De Francesco v. Barnum* (No. 2), 45 Ch. D. 430.

(*l*) *Nichol v. Martyn*, 2 Esp. 732.

(*m*) 3 Burr. 1345; see *Cooper v. Shepherd*, 3 C. B. 266, 272.

(*n*) In *Godsall v. Boldero*, 9 East, 78.

because of the inability of the servant to undertake to pay more; and yet it might have been very far from an adequate compensation to the master for the injury done to him by another who seduced his servant from him." And upon Lawrence, J., observing, "I suppose the Court proceeded upon the ground that the penalty was by the express stipulation of the parties made an equivalent for the loss of the service"; Lord Ellenborough added, "That is so as between the parties themselves; but it may admit of doubt whether that were the fair way of considering it as against a stranger, a wrongdoer." In *Brunsdon v. Humphrey* (o), however, Bowen, L.J., regarded it as decided in *Bird v. Randall* that it was "an answer to an action for seducing a manservant from his service, that penalties had previously been recovered by the master in satisfaction of the injury done him."

It seems that, in the event of the death of the wrongdoer, no action to recover damages would lie against his personal representatives in respect of his having enticed a servant away (p); but an action may be brought to recover the earnings of the servant who has been enticed away and harboured, the action for the tort being waived (q).

Of the Action for Harboursing a Servant.

Where a person, after notice, continues to employ another man's servant, that other may maintain an action against him, although at the time he hired him the second master did not know that he was hiring another man's servant; and, therefore, no action would lie for enticing him away (r).

Thus (s) one Hobbs, who was retained by the plaintiff, a currier, to work by the piece, left the plaintiff's service on a dispute between them, and at the time of departure had some work in hand; he then applied for work to the defendant, who was also a currier, and who employed him, not knowing of his engagement with the plaintiff. A few days afterwards, the defendant having been apprised by the plaintiff that Hobbs was his servant, and had left his work unfinished, and being threatened with an action, in case he continued to employ Hobbs, requested the servant to return to his former master and finish

(o) 14 Q. B. D. 141, at p. 147.

(p) *Phillips v. Homfray*, 24 Ch. D. 454, in which Bowen, L.J., delivering the judgment of the majority of the Court of Appeal, said that the only cases in which, apart from questions of breach of contract express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, are those in which property, or the proceeds or value of property, belonging to another have been appropriated by the deceased person and added to his own estate or moneys.

(q) *Lightly v. Clouston*, 1 Taunt. 112.

(r) *Fawcett v. Beavres*, 2 Lev. 63; *Fosset v. Breer*, 3 Keb. 59; probably *S. C.*; *Wilkins (Fred) & Bros., Ltd. v. Weaver*, [1915] 2 Ch. 322.

(s) *Blake v. Lanyon*, 6 T. R. 221; followed in *De Francesco v. Barnum* (No. 3), 63 L. T. Rep. 514. In *Forbes v. Cochrane*, 2 B. & C. 448, it was held that this action would not lie against the captain of an English ship to which the plaintiff's slaves had escaped, for refusing to give them up. See also *Smith v. Gould*, 2 Salk. 667; *Sommerseff's Case*, 20 How. St. Tr. 65.

his work. This Hobbs refused to do, and the defendant continued him in his service, whereupon the plaintiff brought his action for enticing Hobbs away, and harbouring him after notice. No evidence was given in support of the charge of enticing away, and it was contended, on the part of the defendant, that no action could be maintained for continuing to employ Hobbs after notice, as at the time the defendant engaged him he did not know he was the plaintiff's servant, but the objection was overruled. And *per curiam*, an action will lie for receiving or continuing to employ the servant of another after notice, without enticing him away.

This cause of action, however, is generally joined with that for enticing away a servant, and the observations on that form of action apply to this also.

Of the Action by a Master for the Earnings of his Servant.

A master, deprived of the services of an apprentice or servant who has been enticed away and harboured by another master, is not confined to an action for damages for the injury he has sustained by the loss of his servant. He may in some cases waive the tort, and bring an action for work and labour done by his apprentice or servant for such second master: the maxim in such cases being *Quicquid acquiritur servo acquiritur domino* (t).

This rule of law had formerly a much more extensive signification than it now has: for, during the existence of villenage, whatever was acquired by the villein, whether realty or personalty, became the property of his lord under certain qualifications (u). But even now the rule holds in some degree with respect to apprentices and servants, though with a great difference in point of extent and application, for the relation of the apprentice and servant to the master is more mild and limited than that of a villein to his lord, and "only imports that the master shall be entitled to their personal labour during the time stipulated, either in a particular way, or generally, according to the nature of the apprenticeship or service. Consequently the master cannot claim any other acquisitions than such as are the result of that labour" (x).

What the apprentice or servant earns by his labour whilst he remains with the master, or is actually working for him, falls so clearly within this principle, that there can be no room for doubt (y). Nor can there

(t) Barrington on Stat. 276; Peake's Add. Cas. 121, note; Story on Ag. 421; Paley on Ag. 339; Grot. lib. 3, cap. 7, sect. 4, 2. The French maxim was "*Qui a le vilain, il a sa proye*"; vide 20 How. St. Tr. 36, note.

(u) Litt. ss. 177, 194; Co. Litt. 123 b; and see the form of enfranchisement of a villein given in Barr. on Stat. 279.

(x) Co. Litt. 117 a, note 1; *Shanley v. Hervey*, cited in *Sommersett's Case*, 20 How. St. Tr. 55.

(y) *R. v. Wantage*, 1 East, 601; *R. v. Bradford*, 1 M. & S. 151.

be any where the apprentice or servant is employed by another person with the knowledge and consent of the master, without any circumstances indicating a waiver of his earnings.

Most of the cases upon this subject relate to apprentices in a seafaring way, whose wages and prize-money (z) as seamen, though earned whilst in another service, have been recovered by those to whom they were bound. But the principle which governs them seems to apply to apprentices and servants in general, and has indeed been extended so far as "to give the master a right to the wages or earnings, whether the service is performed by the apprentice with or without the master's licence; and even though the earnings accrue in a trade or service different from that to which the apprentice is bound" (a). Thus, where (b) the defendant seduced an apprentice from on board the plaintiff's ship in Jamaica, and employed him as a mariner to assist in navigating his own ship home, the plaintiff brought an action for the wages earned by his apprentice, and recovered.

And payment to the master has been held to be an answer to an action by the apprentice for wages (c). And where (d) the captain of a ship let the ship to government at forty shillings per ton per month, to be paid to the owner, and an additional shilling per ton per month, to be paid to himself, for his services, but the whole earnings (including the shilling per ton) were paid to the owner, it was held that the captain could not maintain an action against the owner to recover the shilling per ton agreed to be paid to the captain.

One advantage attending this form of action formerly was that it might be brought after the death of the tortfeasor, which was not the case with an action framed on the tort (e).

If the wages or earnings have been paid to the servant the master may recover them from him in an action for money had and received (f).

Ownership of Patents.—It appears to be an exception to the rule that a master is entitled to the profits resulting from his servant's labour,—that if a servant make an invention whilst in the employ of a master, the invention belongs to the servant, and the master cannot

(z) See, e.g., *Carsan v. Watts*, 3 Doug. 350, where the master was held not entitled to prize money, the usage being for the apprentice to have it; *Hill v. Allen*, 1 Ves. sen. 88.

(a) Co. Litt. 117 a, note 1; *Barber v. Dennis*, 6 Mod. 69. The case of *Eades v. Vandeput*, 5 East, 39, does not appear to be of much authority, for the reasons given in *Foster v. Stewart*, 3 M. & S. 191.

(b) *Lightly v. Clouston*, 1 Taunt. 112; and see *Foster v. Stewart*, 3 M. & S. 191.

(c) *Bright v. Lucas*, Peake's Add. Cases, 121. See the note at the end of this case.

(d) *Thompson v. Havelock*, 1 Camp. 527; *Diplock v. Blackburn*, 3 Camp. 43.

(e) Per Bayley, J., in *Foster v. Stewart*, 3 M. & S. 191; see *Phillips v. Homfray*, 24 Ch. Div. 454. For an instance of the waiver of a tort, an administratrix being sued on an implied contract by the deceased to pay money: see *Powell v. Rees*, 7 A. & E. 426.

(f) *Morison v. Thompson*, L. R. 9 Q. B. 480.

take out a patent for it, though it is otherwise where the servant is employed for the express purpose of inventing (*g*). That was the case as to Whitehouse's patent (*h*). "There an individual was employed for the express purpose of suggesting improvements, and trying experiments of all kinds. The master so admitted before the Privy Council, when he applied for an extension of the patent, and the Privy Council, before they granted the extension, compelled the master to give his servant a large remuneration" (*i*). "If a person has discovered an improved principle, and employs engineers, or agents, or other persons to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent; and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle" (*k*). And it "would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent, incorporating them, taken out by his employer. Each case must depend upon its own merits. But when we see that the principle and object of the invention are complete without it, I think it is too much that a suggestion of a workman, employed in the course of the experiments; of something calculated more easily to carry into effect the conceptions of the inventor, should render the whole patent void" (*l*).

In a case in which a manufacturer of tubes, at Birmingham, and his foreman (who had a salary of £300 a year), had together invented certain improvements, for which the master sought letters patent, the granting of which was opposed by the foreman, it was held by Lord Cranworth, L.C., that the letters patent ought only to be granted on the

(*g*) *Bloxam v. Elsee*, 1 C. & P. 558. See also the case of Arkwright, referred to in *Hill v. Thompson*, 8 Taunt. 375: though in Arkwright's case the invention appears to have been made by the servant *before* the service commenced; in which case it would undoubtedly belong to the servant: but see the Report in Davies' Patent Cases, 61; *Makepeace v. Jackson*, 4 Taunt. 770, where it was held that a calico-printer, having discharged his head colourman, was entitled to the book in which that servant had entered the processes for mixing colours during his service, although many of the processes were the invention of the servant. That, however, was only an action of trover for the book, which the master had originally provided. In *Ellwood v. Liverpool Victoria Legal Friendly Society*, 42 L. T. 694, the books used by the collector to a friendly society were held to be the property of the society. In 4 Burr. 2315 the copyright of Rolle's Abridgment was said to be in the king, as he employed the judges who pronounced the law; and at p. 2329 the king was also said to be entitled to the copyright of the year books, as he was at the expense of taking the notes.

(*h*) 1 Webster's P. C. 473. See also *British Reinforced Concrete Engineering Co. v. Lind*, 86 L. J. Ch. 486.

(*i*) *Allen v. Rawson*, 1 C. B. 551, per Cresswell, J., at p. 570.

(*k*) *Ibid.*, per Erle, J., at p. 567.

(*l*) *Ibid.*, per Tindal, C.J., at p. 574.

terms of their being vested in trustees for the benefit of both master and foreman (*m*). In that case, it appeared almost impossible to say which was entitled to the credit of the improvement in question.

Where the defendant has become legal owner of a patent, through the use of that skill, knowledge and inventive ability which, by the terms of his employment, should be applied for his employer's purposes, the employer may be granted a declaration by the Court that the defendant holds the patent as trustee for the plaintiff, the employer (*n*).

Ownership of Copyright.—By the Copyright Act, 1911 (1 & 2 Geo. V. c. 46), s. 5 (1) (b), the author of a work is the first owner of the copyright therein, provided, however, that “where the author was in the employment of some other person under a contract of service or apprenticeship, and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.”

The well-known case of *Shepherd v. Conquest* (*o*), where the Court left open the question whether under some circumstances the copyright in a literary work or the right of representation might not *ab initio* be vested in an employer of the actual composer, must now be read in the light of this statutory provision. In that case the plaintiffs, who were the lessees of the Surrey Theatre, agreed by word of mouth with C., who was what is called a “Stock Author,” that he should go to Paris, for the purpose of adapting a piece there in vogue for representation on the English stage; that the plaintiffs should pay his expenses, and should have the sole right of representing the piece in London, C. retaining the right of representation in the provinces. C. went to Paris, produced a farce, and was paid by the plaintiffs as agreed. The farce was brought out at the Surrey Theatre by the plaintiffs, and afterwards at the Grecian Saloon by the defendant, who had obtained an assignment from C. The plaintiffs brought an action against the defendant for penalties, under the Dramatic Copyright Act, 1833 (*p*). It was held that the arrangement between them and C. did not make them the authors of the farce within the meaning of that Act, although it was

(*m*) *Re Russell's Patent*, 2 De G. & Jones, 130.

(*n*) *Edisonia, Ltd. v. Forse*, 25 R. P. C. 546; *British Reinforced Concrete Engineering Co. v. Lind*, 86 L. J. Ch. 486.

(*o*) 17 C. B. 427; followed in *Eaton v. Lake*, 20 Q. B. D. 378. See also *Nottage v. Jackson*, 11 Q. B. D. 627, a case under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 1 to 6 of which are repealed by the Copyright Act, 1911 (1 & 2 Geo. V. c. 46).

(*p*) 3 & 4 Will. IV. c. 15, repealed by the Copyright Act, 1911 (1 & 2 Geo. V. c. 46).

contended on their behalf that, under the circumstances, C. ought to be considered as merely their servant, the produce of whose labour became the property of his masters at the moment of production, so that no assignment was necessary to vest the property in the latter; and the case was likened to those relating to patent inventions, in which suggestions of a servant employed in perfecting a discovery, tending to facilitate its practical application, may be adopted by his employer, and incorporated into his design without detracting from the originality necessary to sustain a patent for the entire. And it was also contended that the productions of an author are to be dealt with in the same manner as the inventions of a workman, and that the former, like the latter, may become the property of an employer who hires the author's labour, and, as it was said, "buys his brains." To that it was answered that literary productions stand upon different and higher ground from that occupied by mechanical inventions; and that whilst literary property and patents for inventions are both the creatures of statutes, the enactments respecting them differ widely in their origin and details; and Jervis, C.J., said: "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation, can become vested *ab initio* in an employer other than the person who has actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say that, in such a case, the employer is the author of a work to which his mind has not contributed an idea; and it is upon the author in the first instance that the right is conferred by the statute which creates it. We cannot bring our minds to any other conclusion than that C., the person who actually made the adaptation, though at the suggestion of the plaintiffs, acquired for himself, as the author of the adaptation, and so far as that adaptation gives any new character to the work, the statutory right of representing it; and that, inasmuch as the plaintiffs have no assignment, in writing, of that right, they cannot sue for an infringement of it."

A provision of the Copyright Act, 1842, resembling that of sect. 5 (1) (b) of the Copyright Act, 1911, has been the subject of important decisions. By the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 18 (q), it was enacted, that when the proprietor of any periodical work had employed any persons to compose the same, or any portions thereof, and such work or portions had been composed under such employment, on the terms that the copyright therein should belong to such proprietor, and paid for by such proprietor, the copyright in every such periodical

(q) Repealed by the Copyright Act, 1911 (1 & 2 Geo. V. c. 46).

work, and in every portion so composed and paid for, was to be the property of such proprietor, who was to enjoy the same rights as if he were the actual author thereof, and have such term of copyright therein as was given to the authors of books; but nothing was to alter or affect the right of any person so employed to publish any such composition in a separate form who by any contract expressed or implied might have reserved to himself such right.

Accordingly it was held (r) that the proprietor of a periodical who employed a gentleman to write a given article or series of articles, or reports, expressly for the purpose of publication therein, acquired the copyright in such article, and could maintain an action for piracy thereof; the fact of employment and payment being *primâ facie* evidence that one of the terms was that the copyright should belong to the employer.

Again, the proprietor of a trade directory (s) employed the defendant to compose headings under which advertisements of various trades were collected. There was no express agreement as to whether the proprietor or the defendant was to have the copyright in these headings, but from the employment and payment and the nature of the work, the Court drew the inference that the defendant composed the headings on the terms that the copyright should be in his employer. And where an author was employed by a publisher to write articles in an encyclopædia, the House of Lords, looking at the nature of the contract and the circumstances under which it was made, drew the same inference of fact as was drawn in the two cases just mentioned, namely, that the copyright was intended to belong to the employer (t).

In the following case (u) it was held that a composer of music could not sue the person who employed him to compose it as a part of a dramatic piece, for performing it without his consent in writing, contrary to the Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), and the Copyright Act, 1842 (5 & 6 Vict. c. 45).

The plaintiff, a composer of music, was employed by the defendant, who was a manager of a theatre, to compose, and did compose, a certain musical composition for the purpose of being performed at, during and as part of a representation of Shakespeare's play, "Much Ado about Nothing," and alleged, in his declaration, that he had the sole liberty and right of performing the said composition; and that defendant, without his consent in writing, caused it to be performed and represented at the defendant's theatre contrary to the Dramatic Copyright Act, 1833, and the Copyright Act, 1842. The defendant

(r) *Sweet v. Benning*, 16 C. B. 459; see also *Stevens v. Benning*, 24 L. J. Ch. 153; *Grace v. Newman*, 19 Eq. 623.

(s) *Lamb v. Evans*, [1893] 1 Ch. 218.

(t) *Lawrence v. Aflalo*, [1904] A. C. 17.

(u) *Hatton v. Kean*, 1 L. T. 10. Both the statutes referred to were repealed by the Copyright Act, 1911 (1 & 2 Geo. V. c. 46).

pleaded that the musical composition was part of a dramatic piece adapted to the stage by the defendant, with the aid of scenery, dresses, the alleged composition, and other music and accompaniments; the general design of which representation was formed by the defendant, who employed the plaintiff, for reward paid to him, to compose the said musical composition, as part of the said representation and dramatic piece, on the terms that the said musical composition should become part of such dramatic piece, and that the defendant should have the sole liberty of representing and performing the said musical composition with the said dramatic piece, and as part thereof; and that the said musical composition was composed by the plaintiff under the said employment, and on the terms, &c. aforesaid. It was held on demurrer that the plea was a good answer to the action; and Erle, C.J., said: "I found my opinion entirely on the facts stated in the plea, and because no decision has yet been given on such circumstances as those subsisting between these parties. Looking at all the facts as disclosed in the pleadings, it seems to me that the defendant was substantially the author and designer of this dramatic piece. The capital and skill he employed in producing it and bringing it out were considerable, while the plaintiff's duty was small and confined to one subordinate department. The music he furnished was, as it seems to me, composed under the employment, and by direction of, the defendant; was paid for by him, and became his property, and therefore he violated no contract by using it. The very terms of the agreement lead me to this judgment; were it otherwise, a single successful production might induce the plaintiff to withdraw his music, to the great detriment of the defendant"; and Byles, J., added: "This falls within the class of cases in which the Court, in *Shepherd v. Conquest* (x), abstained from expressing any opinion."

Whether or not a contract of service existed within the meaning of the Copyright Act, 1911, s. 5 (1) (b) has been considered by the Court more than once. In one case a person, permanently employed on the staff of a newspaper, was specially employed to translate and summarise a speech in Portuguese. He did the work in his own time. It was held that he did not do the work under a contract of service and accordingly the claim by the newspaper proprietors that the copyright, if any, was in them, failed (y).

In another case examiners were employed by the University of London to prepare papers and examine the answers thereto, the remuneration being a lump sum. The University issued instructions to the examiners, but the work was done at such times as were convenient to them and they were not part of the staff of the University. Peterson, J., held that it was "impossible to say that the examiner in such

(x) 17 C. B. 427.

(y) *Byrne v. Statist Co.*, [1914] 1 K. B. 622.

circumstances can be appropriately described as the servant of the University or that he prepared these papers under a contract of service " (z).

Joint authorship must be distinguished from the relation above discussed. By the Copyright Act, 1911 (1 & 2 Geo. V. c. 46), s. 16 (2) " a work of joint authorship " is defined to mean " a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors " (a).

*Of the Action by a Master for Personal Injuries to his
Servant.*

Numerous instances are to be found in the books of actions by masters for personal injuries to their servants; whether caused by an assault (b), or by battery (c), or by negligent driving (d), or by a ferocious dog (e); and in one case a man recovered damages in an action against a person for negligently entrusting a loaded gun to a mulatto girl, who discharged it against the plaintiff's son and servant (f). This action also depends on the loss of service, but a service *de facto* is sufficient to support the action (g).

It is in this form of action that a parent usually proceeds to recover damages for injuries sustained by his children through the wrongful acts of the defendant, for in such cases a parent cannot recover any damages for his wounded feelings, but only for the loss of service he has sustained (h). Where, therefore (i), the defendant drove his carriage against the plaintiff's son, who was an infant only two years and a half old, and the plaintiff brought an action of trespass, *per quod servitium amisit*, against the defendant; upon its being objected that the child was not competent to perform any act of service by reason of its tender age, the plaintiff was nonsuited, and the nonsuit was afterwards held right by the Court; Holroyd, J., observing: " The mere relationship of the parties is not sufficient to constitute a loss of service. The reasoning in all the modern cases shows that some evidence of service is necessary; none could be given in the present case." If, however,

(z) *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601.

(a) See *Levey v. Rutley*, L. R. 6 C. P. 523.

(b) *Gilbert v. Schwenck*, 14 M. & W. 488.

(c) *Duel v. Harding*, Str. 595.

(d) *Martinez v. Geber*, 3 M. & G. 88; cf. *Hall v. Hollander*, 4 B. & C. 660.

(e) *Hodsoll v. Stallebrass*, 11 A. & E. 301; *Lewis v. Fog*, Str. 944.

(f) *Dixon v. Bell*, 5 M. & S. 198.

(g) *Rosiere v. Sawkins*, Holt, K. B. 460; *Martinez v. Gerber*, 3 M. & G. 88.

(h) *Flemington v. Smithers*, 2 C. & P. 292. Mark the difference in this respect between this action and that for seduction. Formerly, whilst it was petit treason for a servant to kill his master (25 Edw. III. stat. 5, c. 2; see now 9 Geo. IV. c. 31, s. 2; 24 & 25 Vict. c. 100, s. 8), parricide was held not to be petit treason unless the child served the father or mother for wages, or meat, drink, or apparel: 3 Inst. 20.

(i) *Hall v. Hollander*, 4 B. & C. 660.

there is capacity to serve, the tendency of the Courts has been to infer service from residence with the parent, without proof of actual service (*k*). Where the child injured is of such tender age as to render it doubtful whether service could be presumed, the best way to avoid the difficulty is to sue in the name of the child (*l*).

It has, however, been held in one case (*m*), in which a master sued a railway company for injuries to his servant while being carried on the defendant's railway, that the defendants were entitled to succeed. But it has been pointed out (*n*) that that case was decided on demurrer to a declaration in which it was averred that the plaintiff was suing upon a breach of a contract entered into between the servant and the defendants, not upon a tort (*o*).

It is no objection to an action by the master that the servant himself has already recovered damages for the injury he had sustained; for the injury to the servant and that to the master are collateral, not consequent upon each other (*p*).

If the servant be killed upon the spot, no action will lie at the suit of the master (*q*).

Moreover, in any case in which the act or default of the person killing or injuring the servant amounts to a felony, the master may be hindered in suing such person by the ancient (*r*) principle of law, resting upon public policy and expediency, that where a civil claim is founded upon a matter which might be the subject of an indictment for felony, the

(*k*) *Jones v. Brown*, 1 Esp. 217. In *Dixon v. Bell*, 5 M. & S. 198, the plaintiff recovered for an injury to his son, eight or nine years old, without proof of actual service.

(*l*) Formerly, where the master brought an action for trespass for beating his servant, the servant beaten was not a competent witness. *Dunsley v. Westbrowne*, 1 Str. 414; but compare *Duel v. Harding*, Str. 595; *Lewis v. Fog*, *Ibid*, 944; and see 14 & 15 Vict. c. 99, s. 2.

(*m*) *Alton v. Midland Railway Co.*, 19 C. B. (N. S.) 213.

(*n*) *Taylor v. Manchester, Sheffield, and Lincolnshire Railway Co.*, [1895] 1 Q. B. 134.

(*o*) The right of a passenger by railway to be carried safely does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely: *Foulkes v. Metropolitan District Railway Co.*, 5 C. P. D. 157. So a master was held to have a good cause of action where his servant was injured by the negligence of a railway company other than that with whom the contract of carriage was made: *Berringer v. Great Eastern Railway Co.*, 4 C. P. D. 163. It has been held by the Court of Queen's Bench that a master could not maintain an action for the loss of his luggage which had been received by the defendants from his servant to be carried by them as part of the servant's ordinary luggage as a passenger on their railway: *Becher v. Great Eastern Railway Co.*, L. R. 5 Q. B. 241; but it has been since decided by the Court of Appeal where the plaintiff's servant took a ticket and travelled with ordinary luggage on the defendants' railway, and through the negligence of the defendants' servant the luggage was overturned and damaged so that a suit of livery which was the property of the plaintiff was destroyed, that the defendants were liable to the plaintiff for the tortious act of their servant in injuring the plaintiff's property: *Meux v. Great Eastern Railway Co.*, [1895] 2 Q. B. 387.

(*p*) *Martinez v. Gerber*, 3 M. & G. 88; *Edmondson v. Machell*, 2 T. R. 4.

(*q*) *Osborn v. Gillett*, L. R. 8 Ex. 88; *Clark v. London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648; *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C. 38.

(*r*) *Marsh v. Keating*, 1 Bing. N. C. 198; *White v. Spettigue*, 13 M. & W. 603; and the cases collected in *Midland Counties Insurance Co. v. Smith*, 50 L. J. Q. B. 329; *Osborn v. Gillett*, L. R. 8 Ex. 88.

person seeking to enforce it should prosecute for the criminal offence before he can recover in the civil action. But "the rule of public policy only suspends and does not destroy the civil remedy" (s). Moreover, the rule only applies to the party injured by the felonious act of the defendant, so that the Court refused to strike out a paragraph in the claim as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person on whom the felonious act had been committed and had no duty to prosecute (t).

In one case (u) Blackburn, J., suggested that the Court of its own motion might order such an action to be stayed till public justice has been satisfied, but the difficulties of this and other suggested methods whereby effect might be given to this principle of the law were discussed by Bramwell, L.J. (x), without arriving at any definite conclusion.

In this action, the master may recover damages for the loss of service, not only before action brought, but afterwards, down to the time when it appears by the evidence the disability to serve may be expected to cease (y); and he may also recover the amount of the surgeon's bill, although it has not been paid, since the surgeon could compel payment of it, but not unpaid fees the payment of which could not be enforced (z).

Of the Action for Seduction.

This action also depends upon the existence of the relationship of master and servant between the plaintiff and the person seduced (a), and it is the only method in which a parent can recover damages against the seducer of his daughter.

In one respect this action is similar to that lastly treated of, viz., that, as it is the invasion of the legal right of a master to the services of his servant that gives him a right of action for assaults, &c., committed upon his servant, so it is the invasion of the same legal right, and no other, which gives a father a right of action against the seducer of his daughter (b).

But there is this important practical difference between the two actions, that in the action for assaulting, &c., a servant or child, the

(s) *Admiralty Commissioners v. S.S. Amerika*, *supra*, per Lord Parker, at p. 49.

(t) *Appleby v. Franklin*, 17 Q. B. D. 93.

(u) *Wells v. Abrahams*, L. R. 7 Q. B. 544. See the Irish case of *S. v. S.*, 16 Cox C. C. 566.

(x) *Ex parte Ball, Re Shepherd*, 10 Ch. D. 667.

(y) *Hodson v. Stallebrass*, 9 C. & P. 63; 11 A. & E. 301.

(z) *Dixon v. Bell*, 1 Stark. 287.

(a) *Grinnell v. Wells*, 7 M. & G. 1033; *Eager v. Grimwood*, 1 Ex. 61; see *Fores v. Wilson*, Peake, 55.

(b) *Grinnell v. Wells*, 7 M. & G. 1033, per Tindal, C.J.. It is the same in America: *Bartley v. Richtmyer*, 4 Comst. 38; *Dain v. Wycoff*, 3 Seld. Rep. 191; *Ingerson v. Miller* (1886) 47 Barb. 47. Formerly the form of action might be either trespass or case, according as the plaintiff wished to recover for the direct injury to his servant *per quod servitium amisit*, or for the consequential damage. *Chamberlain v. Hazlewood*, 5 M. & W. 515.

plaintiff cannot recover any compensation for the injury his feelings may have sustained; whilst in the action for seduction he may do so (c). And this, in practice, is the chief object of the action for seduction, in which liberal damages are usually given, and the Courts are disinclined to grant new trials merely on the ground of excess in that respect (d). The custom of allowing the jury, in ascertaining the amount of damages in this action, to have regard not merely to the injury sustained by the loss of service, but also to the wounded feelings of the plaintiff, has arisen from a laudable desire to suppress the vice of seduction, against which the criminal law has not provided any punishment (e). The custom, however, has been now so long established that it can only be altered by the Legislature.

There is also this distinction to be observed between this action for seduction and that for enticing away and harbouring apprentices or servants (the gist of which also, as we have seen, is the loss of service), that in the former it is not necessary to prove that the defendant knew the person seduced to be the plaintiff's servant, whilst in the latter it is necessary to do so (f).

The gist of this action being loss of service, it follows that it may be brought by any one who has sustained that loss, whether he be merely the master and not a relative (g), or the parent, brother (h), uncle (i), or aunt (k) of the person seduced. And, in one instance, a person who had adopted a friend's daughter was allowed to bring an action for her seduction (l). But the right of action for an injury of this sort does not pass to the trustee of a master who has become bankrupt, as he has no right to make a profit of a man's wounded feelings (m).

To support this action it is necessary to show an actual or constructive relation of master and servant existing between the plaintiff

(c) In *Dodd v. Norris*, 3 Camp. 519, Lord Ellenborough expressed an opinion that it was necessary to watch that this anomaly should not be carried further, and that the original scope of the action should not be entirely lost sight of.

(d) *Tullidge v. Wade*, 3 Wils. 18; *Bennett v. Alcott*, 2 T. R. 166; *Elliott v. Nicklin*, 5 Price, 641.

(e) *Southernwood v. Ramsden*, Selw., N. P. 1115; *Chambers v. Irwin*, *Ibid. cit.*; *Irwin v. Dearman*, 11 East, 23; *Grinnell v. Wells*, 7 M. & G. 1043, per Tindal, C.J.

(f) *Fores v. Wilson*, Peake, 55, per Lord Kenyon.

(g) *Fores v. Wilson*, *ubi supra*.

(h) *Howard v. Crowther*, 8 M. & W. 601.

(i) *Manvell v. Thomson*, 2 C. & P. 303.

(k) *Edmondson v. Machell*, 2 T. R. 4.

(l) *Irwin v. Dearman*, 11 East, 23. The American Courts go further than the English in making out the constructive relation of master and servant, and hold that it may exist for the purposes of this action, although the daughter was in the service of a third person at the time of the seduction, provided the case be such that the father then had a legal right to her services, and might have commanded them at pleasure: *Bartley v. Richtmyer*, 4 Comst. 38 (1850); *Mulvehall v. Millward*, 1 Kernan's Rep. 343 (1854).

(m) *Howard v. Crowther*, 8 M. & W. 601; *Beckham v. Drake*, 2 H. L. C. 579, at p. 629. As to splitting cause of action in the case of injury to a bankrupt's estate, with special damage to himself, see *Hodgson v. Sidney*, L. R. 1 Ex. 313, and *Ex parte Vine*, *Re Wilson*, 8 Ch. D. 364.

and the person seduced at the time of the seduction, and a consequential loss of service (*n*). In an action by a widow for the seduction of her daughter, it appeared that the seduction had taken place in the lifetime of plaintiff's husband; and it was held that the action was not maintainable, though the daughter had worked for her mother after her father's death, because at the time of the seduction she was in her father's service, and therefore could not be in her mother's service (*o*). To prove an actual relation of master and servant sufficient for this purpose, a binding contract of service is not necessary (*p*). Some service, however, must be shown, though when the action is brought by a father for the seduction of his daughter who resides in his house and so forms part of his household, evidence of very slight acts of service (*q*) will be sufficient, such as milking cows, making tea (*r*), and the like. The Courts will even infer service from mere residence with the parent, where there is a capacity to serve, and a right in the father to the services, as when the daughter is under twenty-one (*s*).

The constructive relation of master and servant arises from the parental relation of father and child, and gives the father, as natural guardian, a right to the services of his child while the child is under age. So as soon as a girl under age ceases to be under the control of a real master and intends to return to her father's house, he has a right to her services; and, therefore, where a girl, having left her situation, was seduced on her way home to her father's house, it was held (*t*) that she was in the constructive service of her father, and he might sue for her seduction.

In the case of an action brought by a father in respect of the seduction of his daughter, the relation of master and servant which would *prima facie* be considered to exist from the proof of facts sufficient to show an actual or constructive service would be displaced if it were shown that the daughter was in the service of some one other than the parent under such circumstances as to negative the parent's right to her services at the time of the seduction. Thus, a daughter was held not to be in the service of her mother in a case (*u*) where, during her leisure hours while under the roof of her master

(*n*) *Davies v. Williams*, 10 Q. B. 725; *Hedges v. Tagg*, L. R. 7 Ex. 283.

(*o*) *Hamilton v. Long*, [1903] 2 I. R. 407; followed in *Peters v. Jones*, [1914] 2 K. B. 781.

(*p*) *Harper v. Luffkin*, 7 B. & C. 387.

(*q*) *Manvell v. Thomson*, 2 C. & P. 303; *Holloway v. Abell*, 7 C. & P. 528; *Manley v. Field*, 7 C. B. (N. S.) 96, per Crowder, J. In this case a woman of thirty-two, having a separate establishment of her own, was held, though she conferred benefits on her father's family, not to render him services for the loss of which an action could be maintained.

(*r*) *Bennett v. Alcott*, 2 T. R. 166; *Carr v. Clarke*, 2 Chit. 260.

(*s*) *Maunder v. Venn*, M. & M. 323; *Torrence v. Gibbins*, 5 Q. B. 300; *Harris v. Butler*, 2 M. & W. 539, per Parke, B.; *Terry v. Hutchinson*, L. R. 3 Q. B. 599; *Peters v. Jones*, [1914] 2 K. B. 781.

(*t*) *Terry v. Hutchinson*, L. R. 3 Q. B. 599; and see *Gladney v. Murphy*, 26 L. R. Ir. 651.

(*u*) *Thompson v. Ross*, 5 H. & N. 16.

she did needlework for her mother with her mistress's express consent; nor in a case (*x*) where the daughter who was in service as a governess was seduced while on a three days' visit, with her employer's permission, at her mother's house; nor in a case (*y*) where the defendant in whose service the daughter was engaged allowed her to go home once a week for an afternoon and evening to assist in household duties. This is so even in a case where the daughter intends to return to her father's house at the end of her term of service (*z*).

A mere temporary absence, however, from her father's house, as on a visit to a friend, if not in the actual service of another, would not defeat the action (*a*). Therefore, where the plaintiff's daughter resided with her brother, but went every day to her father's house and there did for her father the work of a menial servant; it was held that he might maintain an action for his daughter's seduction (*b*). And where a girl was bound to serve the defendant eleven hours a day as servant in husbandry, but slept at her father's house, and after her day's work performed service for her father; it was held that there was sufficient loss of service to enable the father to maintain the action (*c*). And where the defendant hired the plaintiff's daughter as his servant, with a view to obtain possession of her person in order to seduce her, it was held that such a hiring would not defeat an action brought by her father, as it was merely a colourable hiring (*d*).

It is no objection to this action by the master that the person seduced was of age at the time of the seduction (*e*); nor that she was a married woman, if living with her father and acting as his servant; for it is not competent to a wrongdoer to set up the rights of the husband as an answer to the action if the husband do not interfere (*f*).

The plaintiff must also prove a loss of service consequential upon the act of the defendant. So, if the jury find that the child of which the plaintiff's daughter was delivered was not the defendant's, although he was proved to have had connection with her, the plaintiff can sustain no action against the defendant, as he has sustained no loss of service by the defendant's act (*g*). And it has been questioned whether a parent can maintain this action where the loss of service arose from distress of mind consequent upon abandonment after seduction, it being conceived that the damage was too remote (*h*).

(*x*) *Hedges v. Tagg*, L. R. 7 Ex. 283. It might have been otherwise if the seduction had taken place during the holidays to which the daughter was entitled under her agreement with her mistress (per Kelly, C.B.).

(*y*) *Whitbourne v. Williams*, [1901] 2 K. B. 722.

(*z*) *Dean v. Peel*, 5 East, 45; *Harris v. Butler*, 2 M. & W. 539.

(*a*) Per Parke, B., in *Blaymire v. Haley*, 6 M. & W. 55.

(*b*) *Mann v. Barrett*, 6 Esp. 32.

(*c*) *Rist v. Faux*, 4 B. & S. 409.

(*d*) *Speight v. Oliveira*, 2 Stark. 493; *Griffiths v. Teetgen*, 15 C. B. 344.

(*e*) *Bennett v. Alcott*, 2 T. R. 166; *Tullidge v. Wade*, 3 Wils. 18.

(*f*) *Harper v. Luffkin*, 7 B. & C. 387.

(*g*) *Eager v. Grimwood*, 1 Ex. 61.

(*h*) *Boyle v. Brandon*, 13 M. & W. 738.

It would seem that mere seduction, unattended with pregnancy or other ill effects whereby the daughter is disqualified at least in some trifling degree from performing such service as a parent might require, would not give a right of action—there would be no loss of service (*i*).

The daughter or servant, when called as a witness, can only be asked as to circumstances occurring before and immediately after her connection with the defendant, to show that it was against her consent (*k*). And she is not bound to answer, on cross-examination, whether before her acquaintance with the defendant she had not been criminal with other men (*l*). And where she has been cross-examined at length as to circumstances of extreme indelicacy and great levity of conduct in submitting to the defendant's embraces, those circumstances must be explained, if capable of explanation, on re-examination, for the plaintiff cannot, in answer, call witnesses to her general character (*m*). Though, in one case, where the cross-examination went to show that the plaintiff's daughter had conducted herself immodestly towards the defendant before her seduction, and that she kept improper company, witnesses were allowed to be called, on the part of the plaintiff, to prove the general good character and modest deportment of the daughter, and the general respectability of the family (*n*). The plaintiff cannot give evidence of the general good character of the person seduced, except in answer to evidence of general bad character. And therefore, where evidence is given of a specific breach of chastity, the plaintiff is restricted to disproving that specific act (*o*). Nor can evidence be admitted on the part of the plaintiff to show that the defendant accomplished the seduction by means of a promise of marriage (*p*); at least not directly for the purpose of increasing damages, though such evidence may be given indirectly, and is frequently received for the purpose of vindicating the girl's character (*q*). Declarations of the defendant's wife, tending to show that she aided and colluded with the defendant in seducing the plaintiff's daughter, have been admitted in evidence in aggravation of damages (*r*).

On the part of the defendant evidence may be given, in mitigation of damages, not only of the general bad character of the person alleged to have been seduced, but also of particular acts of unchastity on her

(*i*) See the American case of *Ingerson v. Miller*, 47 Barb. 47 (1866).

(*k*) *Colyer v. Mayne*, 2 Carr. & K. 1011.

(*l*) *Dodd v. Norris*, 3 Campb. 519.

(*m*) *Dodd v. Norris*, *ubi supra*; *Bamfield v. Massey*, 1 Campb. 460.

(*n*) *Bate v. Hill*, 1 C. & P. 100. In the note at the end of the case it is said that the course adopted in that case is more conducive to the ends of justice than that adopted in *Dodd v. Norris*. And see 1 Ph. on Ev. 468.

(*o*) *Bamfield v. Massey*, 1 Campb. 460.

(*p*) *Dodd v. Norris*, 3 Campb. 519.

(*q*) *Elliott v. Nicklin*, 5 Price, 647, per Garrow, B. And see *Tullidge v. Wade*, 3 Wils. 18; *Capron v. Balmond*, Exeter Spr. Ass. 1831, Roscoe's Nisi Prius Evidence.

(*r*) *Knowles v. Compigne*, Winton Summ. Ass. 1835, Roscoe's Nisi Prius Evidence.

part (s). But he cannot call witnesses to prove that she has talked of another person than the defendant as her seducer and the father of her child, unless she be first asked in cross-examination whether she ever used those expressions (t). Such evidence, however, might be admissible to show general misconduct and frequent use of loose language (u).

The plaintiff may recover damages for the injury which his feelings have sustained in addition to the actual expense incurred by loss of service and payment of doctor's bills (x). And, in one case, Lord Eldon told the jury that, in estimating the damage sustained by the plaintiff, they might "look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she could feel no consolation; and as the parent of other children whose morals might be corrupted by her example" (y). But the plaintiff cannot aggravate the damages by evidence of the wealth of the defendant (z).

Although the action for seduction is not within the normal jurisdiction of the County Court, such an action may be remitted to it or may be tried there by consent of the parties (a).

3. FIDELITY GUARANTEES.

Where there is a bond of suretyship for an officer, and by the act of the parties, or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided (b). But a mere addition to the duties of the servant would not affect the liability of the surety; as where a collector of poor and other rates was appointed to collect a main drainage rate; or a collector of rents in one county was appointed to collect rents in another county (c).

If a surety makes himself responsible in general terms for the observance of certain relations between the parties in a certain contract between them, he will not be released by an immaterial alteration in that relation, that is to say, where it is evident without inquiry that

(s) *Verry v. Watkins*, 7 C. & P. 308; *R. v. Martin*, 6 C. & P. 562; *R. v. Robins*, 2 M. & Rob. 512. But in *Thompson v. Nye*, 16 Q. B., at p. 178, Erle, J., said he knew no instance of evidence of general bad character being admitted in actions for seduction.

(t) *Carpenter v. Wall*, 11 A. & E. 803. In *Andrews v. Askey*, 8 C. & P. 7, Tindal, C.J., allowed her to be recalled and re-examined on this point.

(u) *Carpenter v. Wall*, *ubi supra*.

(x) *Andrews v. Askey*, 8 C. & P. 7; *Dodd v. Norris*, 3 Campb. 519; *Chambers v. Irwin*, *Southernwood v. Ramsden*, 2 Selw. N. P.; *Terry v. Hutchinson*, L. R. 3 Q. B. 599. As to doctor's bills, see *Dixon v. Bell*, 1 Stark. 287.

(y) *Bedford v. M'Kowl*, 3 Esp. 119.

(z) *Hodsoll v. Taylor*, L. R. 9 Q. B. 79.

(a) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 56, 64; County Courts Act, 1919 (9 & 10 Geo. V. c. 73), ss. 1, 2.

(b) *Pybus v. Gibb*, 6 E. & B. 902; *Bonar v. Macdonald*, 3 Ho. Lords Cas. 226; *Guardians of Malling Union v. Graham*, L. R. 5 C. P. 201.

(c) *Skillett v. Fletcher*, L. R. 1 C. P. 217; 2 C. P. 469.

the alteration is unsubstantial or one which cannot but be beneficial to the surety (*d*).

It has been held that an alteration of the length of notice determining the service from one month to three months was not so material as to discharge the surety, who when he entered into the guarantee was not aware of that term of the contract of service (*e*).

In the absence of a stipulation to the contrary, a surety will not be exempt from liability because there has been a diminution in the salary of the office in respect of which surety was given (*f*). But where the bond recited the amount of the servant's salary, it was held that an alteration in the mode of payment discharged the surety (*g*).

Where a collector had been guilty of irregularities in his mode of accounting it was held that his employers' mere passive acquiescence did not discharge the collector's surety (*h*).

Nor is a surety discharged from liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety guaranteed the employer (*i*).

But if the employer should fail to do something which he has contracted with the surety to do, or fails to preserve some security for the benefit of the surety, the surety would be discharged. So when a surety guaranteed the honesty of a servant, and the master, on discovering the servant had embezzled his money, failed to discharge the servant, as he had power to do, or to tell the surety, the surety was held to be discharged (*k*).

By the Partnership Act, 1890 (53 & 54 Vict. c. 39), it is provided:—

“ Sect. 18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.”

This provision does not alter the law as previously settled by decided cases (*l*).

A guarantee, the consideration for which is given once for all, cannot be determined by the guarantor and does not cease on his

(*d*) *Holme v. Brunskill*, 3 Q. B. D. 495.

(*e*) *Sanderson v. Aston*, L. R. 8 Ex. 73. But see *Holme v. Brunskill*, 3 Q. B. Div. 495.

(*f*) *Frank v. Edwards*, 8 Ex. 214.

(*g*) *North Western Railway Co. v. Whinray*, 10 Ex. 77.

(*h*) *Mayor of Durham v. Fowler*, 22 Q. B. D. 394.

(*i*) *Mayor of Kingston-upon-Hull v. Harding*, [1892] 2 Q. B. 494.

(*k*) *Phillips v. Foxall*, L. R. 7 Q. B. 666.

(*l*) *Backhouse v. Hall*, 6 B. & S. 507; *Dry v. Davy*, 10 A. & E. 30; *Mayor of Dartmouth v. Silly*, 7 E. & B. 97.

death (*m*); and therefore where a bond was given for the integrity of a person in consideration of his being appointed agent and receiver of rents for the estates of the obligee, and the bond contained no stipulation for its determination in the event of the guarantor dying, it was held that the liability undertaken by the guarantor was not determined by his death (*n*).

A fidelity bond for A. would not in general render the surety liable for the acts of A.'s partner (*o*). But the surrounding circumstances must be looked at to ascertain the intention of the parties when the guarantee was given (*p*).

(*m*) *Lloyds v. Harper*, 16 Ch. D. 290.

(*n*) *Re Grace; Balfour v. Grace*, [1902] 1 Ch. 733.

(*o*) *London Assurance Co. v. Bold*, 6 Q. B. 514; *Montefiore v. Lloyd*, 15 C. F. (N. S.) 203.

(*p*) *Leathley v. Spyer*, L. R. 5 C. P. 595.

CHAPTER IV.

THE DUTIES OF THE MASTER TO THE SERVANT AND THE RIGHTS AND REMEDIES OF THE SERVANT AS TO ENFORCING THE PERFORMANCE OF THEM.

1. AS BETWEEN SERVANT AND MASTER.

Of the Master's Duty to receive the Servant into his Service, and retain him; and the Servant's Remedies for Breach of such Duties.

It is obviously the duty of every man who has engaged another person as a servant, to receive such person into his service, and if he refuse to do so without any good reason for his refusal, such person may maintain an action against him for that breach of contract. Thus, where the defendant agreed to take the plaintiff, who was a shepherd, into his service at certain wages for the then next lambing season, for five weeks next ensuing after the 28th February then next, but afterwards refused to allow him to enter into his service, the plaintiff recovered damages in an action brought for such breach of contract on the part of the defendant (a). To sustain this action, however, it would of course be necessary to prove a legally binding contract of hiring and service (b). It is obvious that what would be a good reason for discharging a servant would be an equally good reason for refusing to receive him into one's service, after having engaged to do so. But it is no answer to an action for not performing an agreement to employ the plaintiff, that he has entered into a conspiracy to depart from the agreement, unless the conspiracy has been acted upon (c); nor is a contract of service avoided by the mere concealment of a material fact, provided such concealment does not amount to fraud, so that a governess, who was described as a spinster, but who in fact had been married and divorced, was held entitled to enforce such a contract (d).

(a) *Clarke v. Allatt*, 4 C. B. 335. The master's duty to find work for the servant is considered *ante*, Chap. II., p. 42.

(b) *Bracegirdle v. Heald*, 1 B. & Ald. 722. As to the requisites of the contract, see *ante*, Chap. II., p. 16 *et seq.*

(c) *Hemingway v. Hamilton*, 4 M. & W. 115. See the pleadings in *Mercer v. Whall*, 5 Q. B. 447.

(d) *Fletcher v. Krell*, 42 L. J. Q. B. 55. In *Bettini v. Gye*, 1 Q. B. D. 183, the defendant engaged the plaintiff as a singer in concerts and operas in London for four months at a monthly salary, the plaintiff agreeing not to sing anywhere out

Where a person has entered into a binding agreement to take another into his service on a future day, but before that day arrives, announces his intention not to do so, he is entitled to be believed, and the servant may thereupon immediately bring an action against him, and is not bound to wait till the day arrives to see if the master will change his mind. In a case (*e*), therefore, in which a gentleman in April engaged a courier to accompany him on a tour for three months on the continent of Europe, to commence on the 1st of June, but in May wrote to say he had changed his mind, and declined the courier's services, and the courier thereupon in May commenced an action against him, and afterwards, before the 1st of June, obtained another engagement, on equally good terms, but not commencing till 4th of July; it was held that the courier was entitled to recover, although it was objected, and very powerfully contended, that the plaintiff was bound to remain ready and willing to perform the contract till the day when the actual employment was to begin, and that there could be no breach of the contract before the 1st of June, Lord Campbell, C.J., saying: "The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case the jury, in assessing the damages, would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial."

If the servant do not act upon the master's announced renunciation of the contract, and before the day arrives for the commencement of the service, becomes either by the act of God, *vis major*, or his own misconduct or misfortune, incompetent or unable to perform his part of it, the master would be at liberty to avail himself of those circum-

of the theatre in the United Kingdom for twelve months without the defendant's consent, except at more than fifty miles from London and out of the season. The plaintiff also agreed to be in London six days before the commencement of the engagement for the purpose of rehearsals. It was held, upon the construction of the whole agreement, that the stipulation as to the rehearsals was not made a condition precedent, and the failure of the plaintiff to perform this stipulation did not justify the defendant in refusing to receive the plaintiff into his service.

(*e*) *Hochster v. De la Tour*, 2 E. & B. 678. See also *Frost v. Knight*, L. R. 7 Ex. 111; *Johnstone v. Milling*, 16 Q. B. D. 460. It would be enough if the action of the master were such that the servant would be entitled to conclude that the master no longer intended to be bound by his contract: *Rhymney Railway Co. v. Brecon & Merthyr Tydfil Railway Co.*, 83 L. T. 111.

stances to rescind the contract, and could not afterwards be sued for a breach of it (f).

It is also the duty of a master to retain the servant during the whole time that he has contracted to do so; and if he dismiss the servant before the expiration of that period without lawful cause (g), the servant may maintain an action against him for such wrongful dismissal.

Where a servant is dismissed by his master during the period of service agreed upon, the Court will not grant an injunction (h) to restrain the master from so doing. In a case (i), therefore, in which Lord Cranworth, V.-C., granted an injunction to restrain a lucifer match manufacturer from discharging his manager, who was appointed under a written agreement, Lord Truro, L.C., on appeal, dismissed the order, saying he did not recollect any instance of any attempt on the part of a Court of equity to compel the employer to retain the servant, agent, or manager, and not to forbear to leave him to his remedy at law. "Consider," added his lordship, "what the effect would be; how is it possible for an employer or an agent to go on in the intimate connection which such a contract is calculated to create? They are to be on the same premises, acting in the management of the same business, in this case, and if there is mutual dissatisfaction, well or ill-founded, it is perfectly clear that a management conducted under such circumstances must tend very much to the prejudice of the concern—in this case, I think, particularly."

Similar reasons were given by Lord Justice Knight Bruce, in refusing an injunction to restrain a railway company from discharging a contractor (k).

The nature of the service to be rendered in that case may (without entering into particulars) be described in the words of the first half of the fifth section of the contract, viz., "that the said contractors will, from time to time, and at all times during the term of this contract run and work all the trains of the railway company, and provide, for the purposes of this contract, a sufficient number of efficient foremen,

(f) *Avery v. Bowden*, 6 E. & B. 953; *Reid v. Hoskins*, 6 E. & B. 953; *Barwick v. Buba*, 26 L. J. C. P. 280; *Frost v. Knight*, L. R. 7 Ex. 111; *Johnstone v. Milling*, 16 Q. B. D. 460.

(g) The causes which will justify the dismissal of a servant are considered *ante*, Chap. III., p. 73 *et seq.*

(h) See *ante*, p. 61. The Court will not grant specific performance of a contract of agency: *Chincock v. Sainsbury*, 30 L. J. Ch. 409; nor of a contract of partnership: *Scott v. Rayment*, 7 Eq. 112. Where the master is a trustee, however, as in the case of trustees of a school, the Court will sometimes interfere: *Willis v. Child*, 13 Beav. 117, where Lord Langdale, M.R., granted an injunction to restrain the trustees of a charity school from discharging the master; and see *Doe v. Willis*, 5 Exc. 894; *Daugars v. Rivaz*, 29 L. J. Ch. 685; *Hayman v. Governing Body of Rugby School*, 18 Eq. 28; *Rendall v. Blair*, 45 Ch. D. 139; *Fisher v. Jackson*, [1891] 2 Ch. 84; *Wright v. Marquis of Zetland*, [1903] 1 K. B. 63; *Pottle v. Sharp*, 65 L. J. Ch. 908.

(i) *Stocker v. Brockelbank*, 20 L. J. Ch. 408.

(k) *Johnson v. Shrewsbury and Birmingham Railway Co.*, 3 De G. M. & G. 914; *Chaplin v. North Western Railway Co.*, 5 L. T. 601.

mechanics, engine-drivers, firemen, cleaners, store-keepers, and other persons, and the requisite coke and firewood, oil, tallow, &c., and other materials of the best quality." And Knight Bruce, L.J., said: "We are asked to compel one person to employ, against his will, another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief may be done. A man may have one of the best domestic servants, he may have a valet whose arrangement of clothes is faultless, a coachman whose driving is excellent, a cook whose performances are perfect, and yet he may not have confidence in him: and while on the one hand all that the servant requires or wishes (and that reasonably enough) is money, you are on the other hand to destroy the comfort of a man's existence, for a period of years, by compelling him to have constantly about him, in a confidential situation, one to whom he objects. If that be so in private life, how important do these considerations become when connected with the performance of such duties—duties to society—as are incumbent upon the directors of a company like this."

And upon similar principles, where the defendant agreed to grant a lease to the plaintiff of a wharf and premises, and the plaintiff agreed to employ the defendant as manager at the wharf at a salary and commission, the agreement providing that the employment should be co-extensive with the tenancy, a specific performance of the contract was refused by the Lords Justices (reversing the decision of the V.-C.), on the ground that the contract was one entire contract and could not be divided, and as they could not enforce performance of the contract for personal services, they could not enforce the rest of the contract which depended upon it (*l*).

The Court will not grant an injunction to restrain a breach of a contract of apprenticeship (*m*), nor can an apprentice specifically enforce his contract of apprenticeship (*n*).

Before proceeding to consider the remedies for a servant wrongfully discharged, it may here be observed, that where the contract of hiring is determinable by notice or payment of salary (*e.g.*, by a month's notice or payment of a month's salary), and the master discharges the servant at a moment's notice, the servant in such case being discharged rightfully, in accordance with the contract, the amount of salary agreed to be paid in lieu of notice (*e.g.*, a month's salary) becomes a debt due from the master to the servant, and may be sued for as such (*o*).

(*l*) *Ogden v. Fossick*, 32 L. J. Ch. 73; *Peto v. Brighton, &c. Railway Co.*, 32 L. J. Ch. 677.

(*m*) *Argles v. Heaseman*, 1 Atk. 518.

(*n*) *Webb v. England*, 29 Beav. 44.

(*o*) *East Anglian Railway Co. v. Lythgoe*, 10 C. B. 726; *Hatton v. Macready*, 2 D. & L. 5.

Remedies for Servant Wrongfully Discharged.

A servant wrongfully discharged has the two following remedies open to him at law, either of which he may pursue immediately on his discharge (*p*):—

1. He may treat the contract of hiring and service as continuing, and bring an action against his master for breaking it by discharging him; and this remedy he may pursue whether his wages are paid up to the period of his discharge or not; or,
2. If his wages are not paid up to the time of his discharge, he may treat the contract of hiring and service as rescinded, and sue his master on a *quantum meruit* for the services he has actually rendered (*q*).

The former of these, however, is the remedy more usually adopted, and it is the preferable one, as, in the latter case, the action is founded on an implied contract arising out of actual services, and no such contract arises by implication of law upon a simple dissolution of a special contract of hiring and service in respect of services performed under such special contract previously to its being so dissolved (*r*); and though a jury are at liberty to imply such a contract from circumstances (*s*), and probably would in most cases do so, yet they are not bound to do so, and could only imply a contract to pay wages for the services actually rendered. And, therefore, in the latter form of action, a servant could only recover wages up to the time of his discharge. Whilst in the former case the action being founded on a contract, which the law would imply on the part of the master, to indemnify the servant against all such damages as he had sustained by reason of the master's breach of contract in discharging the servant, and not allowing him to perform his part of the contract: the servant, if he recovered at all, would recover something beyond the amount of wages due at the period of his discharge.

1. The Action for Wrongful Dismissal.

In this action, which illustrates "the general legal rule that an action will lie for unjustifiable repudiation of a contract" (*t*), the servant seeks compensation, not for services he has rendered previous

(*p*) *Pagani v. Gandolfi*, 2 C. & P. 370. It has been stated that a servant wrongfully discharged has his election of *three* remedies, viz., the two spoken of in the text, and also he may wait till the termination of the period for which he was hired, and might then sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service. But the better opinion is that this remedy is not open to him: see the note to *Cutter v. Powell*, 2 Sm. L. C. 1, 12th ed., pp. 52-3.

(*q*) *Lilley v. Elwin*, 11 Q. B. 742, 755; *Planche v. Colburn*, 8 Bing. 14; *Archard v. Horner*, 3 C. & P. 349.

(*r*) *Lamburn v. Cruden*, 2 M. & G. 253.

(*s*) *Ibid.*; and see *Thomas v. Williams*, 1 A. & E. 685; and *Planche v. Colburn*, 5 C. & P. 61.

(*t*) *Rubel Bronze and Metal Co. and Vos, Re*, [1918] 1 K. B. 315, at p. 321.

to his discharge, but for the injury he has sustained by such discharge in not being allowed to serve and earn the wages agreed upon, the measure of damages being the actual loss "which may be much less than the wages, where another employment may be easily obtained" (u).

The claim, being one for damages for breach of contract, passes in case of the servant's subsequent bankruptcy to his trustee (x); but in regard to rights accruing to a bankrupt, after he has been adjudicated bankrupt, in respect of his personal earnings, he has the right to sue in his own name, subject only to the right of his trustee to intervene and claim the fruits of the litigation (y).

In order to enable a servant to maintain the action, he must be ready and willing to continue in his master's service at the time he is discharged (z). Ready does not imply willing (a), but ready and willing implies disposition, capacity and ability (b), i.e., not physical ability, for a servant who is ill may nevertheless be ready and willing to serve (c), but freedom from any other inconsistent engagement. But although it is necessary that he should be ready and willing and able to serve his master in order to enable him to sue his master for a wrongful discharge, it is not necessary that he should offer to do so (d) if he can prove his readiness, &c., in any other way. It is obvious, however, that an offer to discharge his duty is the best proof of his readiness to do it. And as readiness and willingness is a matter that is within his own mind only, the master ought at least to have notice of it (e).

The amount of damages which a servant would recover in an action for wrongful discharge must, of course, depend on the nature of the contract, and the wages agreed to be paid. So in the case of a domestic or menial servant (f), or where there was an express agreement for a month's notice (g), it would be a month's wages. Where no specific wages have been agreed upon, the measure of damages is obtained "by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a

(u) *Elderton v. Emmens*, 6 C. B. 160.

(x) *Wadling v. Oliphant*, 1 Q. B. D. 145.

(y) *Bailey v. Thurston & Co., Ltd.*, [1903] 1 K. B. 137. In *Hoggarth v. Taylor*, L. R. 2 Ex. 105, it was held that a composition deed containing a release by the creditors from "their respective debts and all claims and demands in respect thereof" was no defence to a claim for unliquidated damages for wrongful dismissal.

(z) See *Peters v. Opie*, 2 Wms. Saund. 352 *et seq.*, notes.

(a) *Granger v. Dacre*, 12 M. & W. 431.

(b) *De Medina v. Norman*, 9 M. & W. 827; *Wallis v. Warren*, 4 Ex. 364; *Griffith v. Selby*, 9 Ex. 394.

(c) *Cuckson v. Stones*, 1 E. & E. 248.

(d) *Wallis v. Warren*, 4 Ex. 361; *Levy v. Lord Herbert*, 7 Taunt. 314. But see *Wilkinson v. Gaston*, 9 Q. B. 137.

(e) *Doogood v. Rose*, 9 C. B. 132, per Maule, J., at p. 137; *Armitage v. Insole*, 11 Q. B. 728.

(f) *Fewings v. Tisdal*, 1 Ex. 295.

(g) *Hartley v. Harman*, 11 A. & E. 798.

similar employment could be obtained'' (h). If the servant has been "employed in an equally advantageous manner for the whole of the period for which he was entitled to notice, he cannot claim damages" (i). And if he could have got such employment and there was no good reason why he did not take it, the damages he has suffered would be only nominal (k).

Since the plaintiff in an action for wrongful dismissal is entitled to recover the damages within the contemplation of the parties flowing from the breach of contract, it was held that where it was an implied term of the contract that the servant, a hairdresser's assistant, should be allowed to receive tips from customers, he could recover, in addition to his agreed wages and damages for the loss of commission, a sum in respect of the loss of tips he would have received had he continued in the defendant's service until the expiration of a proper notice (l).

In a case where (m) the defendants, directors of a mining company in South America, agreed to employ the plaintiff as superintendent of mines for three years, at a salary increasing yearly, and the directors were to be at liberty to dissolve the agreement at any time on giving the plaintiff a twelve months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to England; and if the plaintiff served the three years, he should be entitled to the expenses attending the return of himself and his family; and the directors dismissed him before the expiration of the second year, without giving him notice or paying him the year's salary: it was held, that he was only entitled to one year's salary from the date of his dismissal, and to his own expenses for his return to England; and the jury having found for these sums only, the Court refused to increase the verdict by adding expenses incurred by the plaintiff for the return of his family, or for the salary which would have accrued from the time of his dismissal to the end of the third year, when his service would have terminated.

The indemnity which the employer must pay the servant whom he dismisses without notice cannot include compensation for the servant's injured feelings, by reason of the circumstances of his dismissal, or

(h) *Beckham v. Drake*, 2 Ho. Lords Cas. 579, per Erle, J., at p. 606. In *Sowdon v. Mills*, 30 L. J. Q. B. 176, Blackburn, J., said: "If an action is brought by a servant for a wrongful dismissal soon after the dismissal, the judge tells the jury they must speculate on the chance of his getting a new place and base their damages on that. If the action is delayed till the man has got a place, what was matter of speculation before becomes certain then, and the jury calculate accordingly." See also as to damages, *M'Kean v. Cowley*, 7 L. T. (N. S.) 828.

(i) *Reid v. Explosives Co.*, 19 Q. B. D. 264, per Fry, L.J., at p. 269.

(k) *Brace v. Calder*, [1895] 2 Q. B. 253. In *Beckham v. Drake*, 2 Ho. Lords Cas. 606, Erle, J., said: "When a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment."

(l) *Manubens v. Leon*, [1919] 1 K. B. 208.

(m) *French v. Brookes*, 6 Bing. 354. Compare *Re London and Colonial Bank; ex parte Clark*, L. R. 7 Eq. 550.

for loss which he may sustain from the fact that his dismissal makes it more difficult for him to find fresh employment. So where plaintiff was employed by defendants as manager of their business at a weekly salary and a commission on trade done, and one of the terms was that he could be dismissed by six months' notice, and he was wrongfully dismissed, it was held that he was entitled to salary for the six months during which his formal notice would have been current and to the commission which he would probably have earned during the six months had he continued in the employment. Damages in respect of the harsh and humiliating way in which he was dismissed were disallowed in accordance with the general rule that damages for breach of contract are in the nature of compensation, not punishment (*n*).

Contracts of employment sometimes contain a clause providing that if at any time any dispute should arise between the parties in connection with, or regarding their rights and liabilities under, the contract, it shall be referred to arbitration. In such a case where the contract provided that the employers might dismiss the servant if he were guilty of gross misconduct, and the servant, being dismissed on that ground, brought an action for wrongful dismissal, it was held that, the employers being ready and willing to refer the whole matter, the Court had jurisdiction to stay the action, under sect. 4 of the Arbitration Act, 1889 (*o*). The fact of dismissal is not in itself a refusal by the master to arbitrate, so as to prevent him from insisting on the arbitration clause (*p*). Where an action for wrongful discharge (the declaration in which also contained counts for wages and work and labour, &c.) was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from the defendant on the day when the action was commenced; but no claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and dismissal, might amount to such a claim; it was held (*q*) that the plaintiff could not afterwards sustain another action for compensation in damages in consequence of the dismissal from the defendant's employ before the end of the year, but that the award of the arbitrator was a bar to such action.

When an action for wrongful discharge has been brought, and damages recovered and paid, no fresh action can be brought upon the same agreement (*r*).

(*n*) *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488. So far as *Maw v. Jones*, 25 Q. B. D. 107, was an authority for the view that damages could be recovered in respect of the greater difficulty in getting employment resulting from the dismissal, it was disapproved.

(*o*) *Renshaw v. Queen Anne Residential, &c., Co.*, [1897] 1 Q. B. 662.

(*p*) *Parry v. Liverpool Malt Co.*, [1900] 1 Q. B. 339, explaining *Davis v. Starr*, 41 Ch. D. 242.

(*q*) *Dunn v. Murray*, 9 B. & C. 780.

(*r*) *Barnsley v. Taylor*, 37 L. J. Q. B. 39.

It may be convenient to mention here, although seamen's wages are not in general treated of in this book, that the Admiralty Division has jurisdiction to entertain a claim by seamen for wrongful dismissal and consequential damages (s).

2. *The Common Action for Wages brought by a Servant wrongfully Discharged.*

This form of action treats the contract of hiring and service as rescinded (t). The ground on which a servant wrongfully discharged may support it is one equally applicable to all contracts; viz., that when one party to a contract has absolutely refused to perform something essential on his side of the contract the other party is at liberty to rescind it, and sue for what he has already done under it upon a *quantum meruit* (u).

Where the servant elects to pursue this remedy immediately on his discharge, he can only recover wages for the period during which he has actually served (x).

And when a servant has refused to treat the contract of hiring and service as rescinded by his wrongful discharge, and has brought a special action against his master for such wrongful discharge, he cannot afterwards treat the contract as rescinded, and sue in this form of action for his wages during a broken quarter; they must be recovered in the special action, or not at all (y).

Of the Duty of the Master to pay the Servant his Wages, and the Servant's Remedies to recover them.

In cases where services have been rendered without any express contract to pay for them, the servant cannot maintain (z) an action for wages unless the circumstances are such as to afford evidence

(s) *The Great Eastern*, 36 L. J. Adm. 15; *The Blessing*, 3 P. D. 35; *The Justitia*, 12 P. D. 145: and see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 162, and *Hutton v. Ras S.S. Co.*, [1907] 1 K. B. 834.

(t) *General Billposting Co., Ltd. v. Atkinson*, [1909] A. C. 118. See the remarks of Bowen, L.J., in *Boston Deep Sea Fishing and Ice Co. v. Ansell*, 39 Ch. D. 339, at p. 365.

(u) See 2 Sm., L. C., note to *Cutter v. Powell*, where the cases are collected; *Planche v. Colburn*, 8 Bing. 14; *Archard v. Horner*, 3 C. & P. 349; *Smith v. Hayward*, 7 A. & E. 544; *Fewings v. Tisdal*, 1 Ex. 295. See also *Prickett v. Badger*, 1 C. B. (N. S.) 296; *Berwick v. Horsfall*, 4 C. B. (N. S.) 450; *Robins v. Power*, 4 C. B. (N. S.) 778.

(x) *Smith v. Hayward*, 7 A. & E. 544; *Fewings v. Tisdal*, 1 Ex. 295.

(y) *Goodman v. Pocock*, 15 Q. B. 576.

(z) *Foord v. Morley*, F. & F. 496. The mere existence of a valid contract of hiring and service does not necessarily imply a contract to pay wages; as it often happens with boys and others that their board, lodging, and clothes, together with the opportunity of learning their master's business, or the latter consideration alone, is a sufficient compensation for their services; *R. v. Shinfield (Inhabitants)*, 14 East, 541. In *Harper v. Linthorpe Dinsdale Smelting Co.*, 101 L. T. 608, it was held that the workman could not recover compensation for loss of time by reason of being kept waiting for his wages, there being no evidence of any implied contract so to do.

sufficient to justify a jury in finding that there was an implied contract to pay for such services.

Upon this principle Lord Mansfield always nonsuited slaves who had been brought over to England and commenced actions for wages (a). And where a person, who had been a slave in the West Indies on an estate belonging to a lady, came over with her to England, and continued in her husband's service in England, Lord Kenyon held, that he could not maintain any action for wages against the husband without some evidence of a promise by him to pay them, as there was no original contract of service for wages (b).

And so where a man and wife lived with his brother, and assisted him in carrying on his business, it was held to be clear that he and his wife were not entitled to be paid for their services, unless the jury were satisfied that there was a contract express or implied on the part of the defendant to pay for such services (c).

So it has been held in America, that where an unmarried daughter above twenty-one remained with her father, and nothing was said about wages, no contract to pay wages could be implied (d).

And a sailor, sent by his captain to assist a vessel aground, could not sue the owner of the stranded ship for his services, there being no contract (e).

A director of a limited company is not its servant, so that it is not to be implied from the mere fact of his being a director that he has a right to be paid for his services. His payment, unless made under some special provision, is in the nature of a gratuity (f). And a partner acting as a managing secretary would not be thereby entitled to a salary (g).

In these cases the defendant may give such evidence as goes to show that the circumstances from which the plaintiff would induce the jury to imply a contract to pay wages; do not warrant any such inference; as that the plaintiff cohabited with him, since that goes to show that the contract was not one of hiring and service, but of a different nature (h). Or the defendant may show that the plaintiff misconducted himself, but only so as to rebut any inference of an implied contract to pay for his services (i).

And the presumption arising from the acceptance of services rendered would be rebutted if it be shown that the acceptance was given under

(a) *R. v. Thames Ditton (Inhabitants)*, 4 Doug. 300.

(b) *Alfred v. Fitzjames*, 3 Esp. 3.

(c) *Davies v. Davies*, 9 C. & P. 87.

(d) *Green v. Roberts*, 47 Barb. 521.

(e) *Lipson v. Harrison*, 2 W. R. 10.

(f) *Hutton v. West Cork Railway Co.*, 23 Ch. D. 654; *Re George Newman & Co.*, [1895] 1 Ch. 674.

(g) *Hutcheson v. Smith*, 5 Ir. Eq. 117.

(h) *Bradshaw v. Hayward*, Car. & M. 591.

(i) *Cooper v. Whitehouse*, 6 C. & P. 545; compare *Speck v. Phillips*, 5 M. & W. 281; *Monkman v. Shepherdson*, 11 A. & E. 411.

such circumstances of mistake as to render it incredible that the services ever would have been accepted if the true facts had been known (*k*).

A person who has agreed to do certain work on behalf of another for an agreed remuneration cannot claim further compensation for matters done in the ordinary course of his employment. A Government contractor who employed a commission agent in the sale of goods to the Admiralty was sued by the agent in respect of his attendances at Somerset House, where patterns of these goods were inspected by Government officers. Rolfe, B., told the jury that it was a question for them whether in giving these attendances the plaintiff was acting in the ordinary course of his business as agent, and if the attendances were a matter beyond his duty as agent, he would be entitled to be paid for them separately (*l*). So too "a banker, merchant or solicitor who employs managers or clerks to work for salaries at his bank or offices does not thereby fall under any implied liability to reimburse them their travelling expenses to and from the bank or offices" (*m*).

Upon similar principles it is equally clear, that where a stipulated remuneration has been agreed upon, the servant has no claim to additional remuneration on the mere ground of his performance of additional services of the same kind as those which he was already bound to perform. Unless he can prove some contract, either express or implied, on the part of his master to pay him an increased salary for his additional services, he can recover no remuneration for them. Thus, where a clerk to the commissioners of land-tax employed the plaintiff as his deputy at a salary of £100 a year, and on new duties being imposed, which gave the clerk additional work, the plaintiff also performed that, it was held, that he was not legally entitled to any additional salary on that account: Lord Kenyon observing, that if he was, every porter in a shop, or clerk in an office, would, upon an increase of his master's business, be equally entitled to demand an increase of wages (*n*). The real ground upon which these cases are decided is, that there is no consideration for the promise to pay additional wages.

Similarly, where A. is B.'s servant, a promise by C. to pay A. additional wages would be void, as being without consideration, all his services being sold to B. (*o*). Though it would be otherwise if C. originally induced A. to enter B.'s service by a promise of wages in addition to those paid by B. (*p*).

And where a sailor was under articles for a voyage out to M. and home, and on arrival at M. the captain, in consequence of the desertion

(*k*) *Re Bodega Co.*, [1904] 1 Ch. 276.

(*l*) *Marshall v. Parsons*, 9 C. & P. 656.

(*m*) *Young v. Naval, Military and Civil Service Co-operative Society*, [1905] 1 K. B. 687, 695.

(*n*) *Bell v. Drummond*, Peake, 45; *Harris v. Watson*, Peake, 72; *Stilk v. Myrick*, 2 Campb. 317; *Frazer v. Hatton*, 26 L. J. C. P. 226.

(*o*) *Carter v. Hall*, 2 Stark. 361.

(*p*) *Clutterbuck v. Coffin*, 3 M. & G. 842.

of some of the crew, promised him double wages to induce him to remain, it was held that he could not sue the shipowners for such double wages; there was no consideration, as he was not free from his original contract (q). But if anything had occurred to set him free from his articles, as if the prosecution of the voyage would be dangerous to life, in which case he would not be bound to proceed at the risk of his life, in such case a sailor might sue for a promised increase of wages (r), and similarly, if there had been an entire change of voyage (s).

Where a vessel is *bonâ fide* abandoned at sea by order of the master for the purpose of saving life, and the contract entered into with the mariners is thereby put an end to, they may become entitled to be rewarded as salvors, though until then, the crew, being bound to exert themselves to the utmost without extra remuneration, are not entitled to salvage (t).

It has been held, that upon a simple dissolution of a special contract of hiring and service, no new contract arises, by implication of law, in respect of services performed under such special contract previously to its being so dissolved (u).

Where, therefore, the plaintiff was engaged as superintendent of packets in the service of a steamboat company at a yearly salary, payable quarterly, and a month after the termination of one of the years of the service tendered his resignation, which after another month was accepted, but nothing was said about remuneration for the time elapsed since the termination of the last year's service, it was held that the law would not imply an engagement to pay for the services performed during that time, but that it ought to have been left to the jury to say whether the parties had come to an agreement that those services should be paid for.

It sometimes happens that, by the terms of the agreement entered into, it is left to the employer to determine whether or not any remuneration should be paid for services rendered, and, if any, what amount should be paid (x). In such cases, if it appear clearly to have been the

(q) *Harris v. Carter*, 3 E. & B. 559.

(r) *The Araminta*, 18 Jur. 793; *Hartley v. Ponsonby*, 7 E. & B. 872. And see *Hanson v. Royden*, L. R. 3 C. P. 47; *Hopkins v. M'Bride*, 50 W. R. 255.

(s) *Harris v. Carter*, *supra*, per Lord Campbell, C.J.

(t) *The Florence*, 16 Jur. 572; *The Vrede*, 30 L. J. Pr. M. & Ad. 209. See this latter case, and also *Newman v. Walters*, 3 Bos. & P. 616, as to a passenger suing for salvage.

(u) *Lamburn v. Cruden*, 2 M. & G. 253. The mere fact that the defendant has received the benefit of what the plaintiff has done is not sufficient to entitle the plaintiff to recover on a new implied contract to pay. It is only when the circumstances are such as to give an option to the defendant to take or not to take the benefit of the work done that there is any evidence on which to ground the inference of a new contract: *Sumpter v. Hedges*, [1898] 1 Q. B. 673.

(x) In *London Tramways Co. v. Bailey*, 3 Q. B. Div. 217, the defendant became conductor of a tramway company, and deposited £5 as security for the discharge of his duties, &c., and it was provided that the "manager of the company should be sole judge between the company and the conductor whether the company was to be entitled to retain the whole, or any part, of the £5 and wages for the current week as liquidated damages, and that the certificate should be binding and conclusive evidence in all

intention of the parties that the employer should decide whether or not he would make any remuneration for the services rendered, no action can be maintained against him by the person employed, unless the employer has, after the performance of the work, expressly promised to pay something.

Thus, where a person performed work for a committee under a resolution that any service to be rendered by him should at a certain time be "taken into consideration, and such remuneration be made as should be deemed right," it was held, that no action would lie to recover remuneration for such work, as the person employed threw himself upon the mercy of the committee, who were to judge whether he should have anything, and if anything, then how much (*y*).

And where (*z*) the plaintiff wrote to the defendant and agreed to accept the appointment of secretary to a joint-stock company at a yearly salary of £300, "if the company be completely registered and put into operation: if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of, and your means can afford." The defendant, in replying, said, "It is distinctly agreed and understood that if the company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right, as compensation for labour done, in the event of the company not being carried out." The company was never registered or carried out. And it was held that the plaintiff could not sue the defendant for compensation for services rendered towards registering the company.

Upon similar principles the Court of Queen's Bench refused (*a*) to grant a mandamus to a local board of health to pay a reasonable remuneration to a person who presided at the first election of the board, upon a suggestion that they had allowed only an inadequate sum; the board having, under the Public Health Act, 1848 (*b*), a discretion as to what sum they think reasonable to allow, and the exercise of their discretion in this respect not being subject to review.

But if it appears from the agreement to have been the intention of the parties that the servant should be remunerated (*c*), but the amount

Courts of justice; and it was held that the manager's certificate was final and conclusive; and that a magistrate could not make any further inquiry. See as to this case *Armstrong v. South London Tramways Co.*, 64 L. T. Rep. 96.

(*y*) *Taylor v. Brewer*, 1 M. & S. 290; and see *Moffatt v. Dickson*, 13 C. B. 575; *Moffatt v. Laurie*, 15 C. B. 583.

(*z*) *Roberts v. Smith*, 4 H. & N. 315.

(*a*) *Ex parte Metcalfe*, 6 E. & B. 287. As to the effect of a resolution by a local authority undertaking to pay salary or wages to a servant enlisting for service in the Great War, see *Shipton v. Cardiff Corporation*, 116 L. T. 687.

(*b*) 11 & 12 Vict. c. 63, s. 30; repealed and re-enacted by the Public Health Act, 1875.

(*c*) As is generally the case where professional men are employed. In such cases, however, the onus lies upon the plaintiff to make out his case, if the employer raises a doubt whether the services were not to be gratuitous: *Hingston v. Kelly*, 18 L. J.

of his remuneration was not settled, he will be entitled to recover upon the *quantum meruit* the fair value of his services. Thus, where (d) a law stationer said to his son on coming of age, "You shall have fifteen shillings a week till October; the books will then be made up and you shall have a share; we need not talk of the share till October comes; we shall settle it then," Lord Ellenborough held that the son was evidently entitled to a beneficial interest in the business, leaving the amount to be settled when the books should be balanced, and that the jury must consider what was a fair and just proportion for the father to give and the son to expect after what had passed between them.

And where (e) A. agreed to enter into the service of B., and wrote to him a letter as follows:—"I hereby agree to enter your service as weekly manager, commencing next Monday: and the amount of payment I am to receive I leave entirely to you"; and A. served B. in that capacity for six weeks; it was held (Lord Wensleydale *dissentiente*) that the contract implied that A. was to be paid something at all events for the services performed, and that the jury in an action on a *quantum meruit* might ascertain what B., acting *bonâ fide*, would or ought to have awarded.

Also where (f) a verbal agreement had been made on behalf of a board of guardians with the surgeon, to attend a number of pauper children who had been attacked by Asiatic cholera, for which he was to receive *whatever remuneration the board of guardians should allow as right and proper*, and he attended them for several weeks, after which the board tendered him £50 as a remuneration: it was held by Maule, J., that he might maintain an action for what was right and proper, and left it to the jury to ascertain what the board, acting *bonâ fide*, ought to have awarded.

Where the plaintiff had by letter agreed that his salary was to be paid only in the event of the success of the undertaking, it was held

Ex. 360; *Moffatt v. Laurie*, 15 C. B. 583. If services have been rendered, "it ought to be clearly and satisfactorily made out that those services were not to be remunerated"; per Channell, B., in *Browning v. Great Central Mining Co.*, 29 L. J. Ex. 399. If the defendant put it out of the plaintiff's power to earn money agreed on, he would be liable to an action. *Inchbald v. Western Neigherry Coffee, &c., Co.*, 17 C. B. (N. S.) 733.

(d) *Peacock v. Peacock*, 2 Camp. 45.

(e) *Bryant v. Flight*, 5 M. & W. 114; but see *Roberts v. Smith*, 4 H. & N. 315, at p. 319.

(f) *Bird v. M'Gahey*, 2 Carr. & K. 707. In *Baxter v. Gray*, 3 M. & G. 771, a surgeon who had attended a patient in expectation of a legacy, was allowed to maintain an action for his services against the patient's executors, having been disappointed of his legacy, and there being no proof of any understanding as to how the plaintiff was to be remunerated. *Hulse v. Hulse*, 17 C. B. 711, was an action on a promissory note given by a moribund uncle to a nephew who had been his clerk for many years at a guinea and 30s. a week; and had also rendered other services, which continued up to the death of the uncle. The question was, whether there was any consideration for the note, and Jervis, C.J., said: "In order to make future services a good consideration for the giving of the note, we think it was incumbent on the plaintiff to show that there was some contract for future services which might have been enforced by the giver of the note if the recipient omitted to perform it."

that there was evidence to go to the jury that the plaintiff had a right to receive something for his services (*g*).

If either of the above questions depend upon the certificate of a third person, the obtaining such certificate is in general a condition precedent to the right of the servant to maintain any action, and if it is withheld by such third person, no action for wages can be maintained by the servant (*h*). His remedy is an action against the third person for withholding the certificate (*i*), as until he has spoken (even though his certificate is withheld unreasonably and capriciously) (*k*), no right can arise which can be enforced either at law or in equity. In a case (*l*), therefore, where the plaintiff agreed to serve the defendant as apothecary's assistant for one year gratuitously, and after that to receive such salary as C. should think reasonable, and it appeared that no application had been made to C. to fix any salary, it was held that the plaintiff could not recover any salary.

Under certain provisions of the Truck Acts of 1831, 1887 and 1896, and the Hosiery Manufacture (Wages) Act, 1874, payments of wages in certain trades is forbidden to be made otherwise than in current coin of the realm, and restrictions are put on stoppages and deductions being made by employers in respect of fines and such like matters.

With regard to certain other trades, Acts of Parliament have been passed to forbid the payment of wages in public-houses, beershops and other similar places; such as the Metalliferous Mines Regulation Act, 1872 (35 & 36 *Vict. c. 77*), s. 9, the Coal Mines Act, 1911 (1 & 2 *Geo. V. c. 50*), s. 96, and the Payment of Wages in Public-houses Prohibition Act, 1883 (46 & 47 *Vict. c. 31*) (*m*).

Under certain statutes, in order that pieceworkers may the more readily check the amount of wages due to them, the employer is required to deliver to the workman certain stated particulars. Under the Hosiery Act, 1845 (8 & 9 *Vict. c. 77*), tickets containing the agreement between employer and workman must be given to persons employed in the manufacture of hosiery. The Silk Weavers Act, 1845 (8 & 9 *Vict. c. 128*), makes similar provision in regard to silk weavers.

(*g*) *Rawlings v. Chandler*, 9 Ex. 687.

(*h*) *Morgan v. Birnie*, 9 Bing. 673; *Milner v. Field*, 5 Ex. 829, which were cases of building contracts where the architect's certificate had not been obtained. See also *Grafton v. Eastern Counties Railway*, 8 Ex. 699; *Scott v. Avery*, 5 H. L. C. 811; *Scott v. Corporation of Liverpool*, 3 De G. & J. 334; *Munro v. Butt*, 8 E. & B. 738.

(*i*) *Padley v. Lincoln Waterworks Co.*, 2 Mac. & G. 68; *Ludbrook v. Barrett*, 36 L. T. 616; *Batterbury v. Vyse*, 32 L. J. Ex. 177.

(*k*) *Clarke v. Watson*, 18 C. B. (N. S.) 278; *Stadhart v. Lee*, 32 L. J. Q. B. 75. The certificate need not be in writing, unless a written certificate is expressly required: *Roberts v. Watkins*, 32 L. J. C. P. 291. When given it is final: *Goodyear v. Mayor of Weymouth*, 35 L. J. C. P. 12. The damages in an action for withholding the certificate would be the value of the work done: *Worthington v. Sudlow*, 31 L. J. Q. B. 130, per Cockburn, C.J., at p. 136.

(*l*) *Owen v. Bowen*, 4 C. & P. 93.

(*m*) See Chitty's Statutes, title, "Master and Servant." Deductions from wages for the workman's contribution are authorised under the Unemployment Insurance Acts, 1920 and 1921, and the National Health Insurance Acts, 1911 to 1921.

Particulars of work and wages are also required to be given to piece-workers in textile factories under the Factory and Workshops Act, 1901 (1 *Edw. VII. c. 22*), s. 116. And, following the example of the coal industry, the Checkweighing in Various Industries Act, 1919 (9 & 10 *Geo. V. c. 51*), gives to the workmen engaged in the production or manufacture of iron or steel, the loading or unloading of goods, the getting of chalk or limestone, the manufacture of cement and lime, and such other industries as may be included by regulations, when such workmen are paid according to the quantity of material gotten, produced or handled, the right to check the weighing of the material or to test the accuracy of the weight, generally by the appointment of a checkweigher.

The action for wages should of course be brought against the person by or for whom the plaintiff was hired.

In the case of a servant engaged by one of several partners, all the partners would be liable if the contract was made in respect of the partnership (*n*), although the contract was in writing (not being by deed), and signed by one only.

But one of several persons concerned in the promotion of a project cannot sue another member of the association for services rendered in connection with the object of the association (*o*).

And where (*p*) the plaintiff himself was a promoter of a projected joint-stock company, it was held that he could not sue a member of the provisional and managing committee for salary alleged to be due to him for services as the secretary to the projected company. And Lord Wensleydale said: "If it were a transaction among ordinary persons the evidence might be sufficient to make out a *primâ facie* case against the persons who signed or sanctioned the employment of the party, that he was to be a paid secretary. But when we have the additional fact that he is himself one of the original promoters and projectors of the company, more evidence is necessary than in the case of a mere stranger: and the question is, whether he is not so implicated in the scheme that all the acts of the provisional committee are to be considered as his acts, and consequently that he is one of his own employers. The provisional committee are a delegated body, acting for others: and, *primâ facie*, any contract they make is made on behalf of those who appointed them, and orders given by them are *primâ facie* the orders of all the projectors, including the plaintiff. The plaintiff, therefore, was bound to give further evidence to show that the defendant meant to contract as a principal, independently of his acts as a provisional committeeman of the company. On the facts in evidence in this case no such intention appears."

(*n*) *Drake v. Beckham*, 11 M. & W. 315; 2 Ho. Lords Cas. 579, 623.

(*o*) *Holmes v. Higgins*, 1 B. & C. 74.

(*p*) *Wilson v. Viscount Curzon*, 15 M. & W. 532; see also *Milburn v. Codd*, 7 B. & C. 419.

However, where an express agreement with the plaintiff was entered into by a committee for obtaining a Turnpike Road Act to do certain work, and the plaintiff afterwards became a subscriber, it was held that he was not thereby precluded from recovering for work done under such express contract before he became a subscriber (*q*).

If the amount sought to be recovered for wages is small, it will be better to sue in the County Court than in the High Court, since, under section 11 of the County Courts Act, 1919 (9 & 10 *Geo. V. c. 73*), if in an action in the High Court founded on contract a plaintiff recovers less than £40 he will *primâ facie* be entitled to no costs at all, and if he recovers a sum not exceeding £100 he will *primâ facie* be entitled to County Court costs only. And wages up to £10 in amount due to workmen and labourers may be recovered by summary proceedings before a magistrate (*r*). But where a discharged servant has brought an action in the County Court for wrongful discharge and failed, he cannot afterwards take proceedings for recovery of wages before a magistrate (*s*).

It sometimes happens that wages which have actually been paid are again demanded in consequence of no receipt having been taken. In such cases, the Courts will sometimes presume, from the lapse of time or other circumstances, that they have been paid, and the servant will not be allowed to recover in an action for them.

Thus, in a case tried many years ago at Guildhall, which was an action by a workman at a sugar refiner's, a witness proved that the plaintiff had worked there for more than two years. "But Abbott, C.J., said that he should direct the jury to presume that men employed in that way were regularly paid every Saturday night, unless some evidence was given on the part of the plaintiff to satisfy the jury that the plaintiff had, in point of fact, never been paid; and as no such evidence was produced, the plaintiff was nonsuited" (*t*).

And in an action for wages, as a menial servant, Gaselee, J., ruled that in the regular course, "if a servant has left a considerable time, the presumption is, that all the wages have been paid" (*u*); and in

(*q*) *Lucas v. Beach*, 1 M. & G. 417.

(*r*) The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), for which see Chitty's Statutes, title, "Master and Servant;" and see the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 22, as to wages of drivers and conductors of hackney carriages and metropolitan stage carriages, and disputes between them and their employers; and Merchant Shipping (Stevedores & Trimmers) Act, 1911 (1 & 2 *Geo. V. c. 41*), giving power to arrest a ship, the owners of which do not reside in the United Kingdom, if it is claimed that any sum is due for work done in connection with the stowing or discharging of the cargo or the trimming of coal.

(*s*) *Routledge v. Hislop*, 29 L. J. M. C. 90; and *vice versâ* *Millett v. Coleman*, 44 L. J. Q. B. 194.

(*t*) Note to *Sellen v. Norman*, 4 C. & P. 81; see also *Lucas v. Novosilieski*, 1 Esp. 296. As to payment of wages by a stranger not himself liable as co-contractor, or otherwise, see *Simpson v. Egginton*, 10 Ex. 845, 847.

(*u*) *Sellen v. Norman*, 4 C. & P. 80. In a note to this case the reporter says with truth, "It would often save persons great inconvenience and expense if, when they paid a servant's wages, they took a regular receipt."

another case (*x*), Lord Wensleydale said: "Where a person serves in the capacity of a domestic servant and no demand for payment of wages is made by the servant for a considerable period after such service has terminated, the inference is either that the wages have been paid or that the service was performed on the footing that no payment was to be made."

There may be remuneration other than wages, livery for example, or a gratuity. In respect of the former, it has been held that a servant who was hired at thirty guineas a year and a suit of clothes, and was provided with a livery, but was dismissed without sufficient cause before the end of the year, could not maintain trover for the livery against his mistress, the property being in her, and that his remedy was an action for not being allowed to serve to the end of the year, when he would have become entitled to the livery (*y*). And as to a gratuity, it has been held that no action will lie for a gratuity promised at the end of the year (*z*), unless it were promised as part of the wages (*a*).

Conciliation in Trade Disputes.

The prevention and settlement of trade disputes has long been the subject of legislation. Thus in 1867 an attempt was made to establish councils of conciliation to adjust differences between masters and workmen, but the Councils of Conciliation Act, 1867 (30 & 31 Vict. c. 105), which was passed for this purpose, appears to have failed in its object, and was repealed, with the two Acts just referred to, in 1896, by the Conciliation Act of that year (*b*), by which conciliation boards were regulated and the Board of Trade given certain powers of intervention in connection with trade disputes. The most recent attempt has been the Industrial Courts Act, 1919 (9 & 10 Geo. V c. 69), by which provision is made for the establishment of Industrial Courts and Courts of Enquiry in connection with trade disputes.

Effect on Contract of Hiring of Bankruptcy of Master, Dissolution of Partnership, or Death of Master.

Bankruptcy of Master.—The bankruptcy of a master does not of itself operate to dissolve a contract of hiring (*c*), but the fact of a

(*x*) *Gough v. Findon*, 7 Ex. 50.

(*y*) *Crocker v. Molyneux*, 3 C. & P. 470.

(*z*) *Parker v. Ibbetson*, 27 L. J. C. P. 236; see *Maddison v. Alderson*, 8 A. C. 467, which arose out of a promise to make a will in favour of a servant; and in which *Loffus v. Maw*, 32 L. J. Ch. 49, was disapproved of.

(*a*) *Lake v. Campbell*, 5 L. T. (N. S.) 582, where in an action for wrongful discharge plaintiff, who was wrongfully discharged before Lady-day, was held entitled to damages for loss of "a gift of £20" promised if he remained till Lady-day: as the sum of £20 was not merely a gift but a remuneration for work to be done, and calling it a "gift" did not make it the less a remuneration.

(*b*) 59 & 60 Vict. c. 30. See Chitty's Statutes, title, "Master and Servant."

(*c*) The Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 34, provides that where at the time of the presentation of the bankruptcy petition, any person is apprenticed

servant's ceasing to serve his master, when his master is adjudicated bankrupt, may show that the contract of service has been dissolved by mutual consent (*d*).

In the case of a limited company the appointment of a receiver and manager in a debenture-holder's action (*e*), or a compulsory winding-up order (*f*), is a notice of discharge to the servants employed by the company. But a resolution for a voluntary winding-up does not necessarily operate as a dismissal of the servants of the company (*g*).

In the distribution of the property of a bankrupt, it is provided by section 33 of the Bankruptcy Act, 1914 (4 & 5 *Geo. V. c. 59*), that certain payments shall be made in priority to all other debts. These payments include: "All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order (*h*), not exceeding fifty pounds"; and, "All wages of any labourer or workman, not exceeding twenty-five pounds, whether payable for time or for piece-work, in respect of services rendered to the bankrupt during two months before the date of the receiving order: Provided that, where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, the priority under this section shall extend to the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order."

The Act also provides that the foregoing debts "shall rank equally between themselves and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves"; and "subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor is sufficient to meet

or is an articulated clerk to the bankrupt, the adjudication of bankruptcy shall, if either the bankrupt or apprentice or clerk gives notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement; and provision is also made for the repayment of a reasonable part of the premium and for the transference of the indenture of apprenticeship or articles of agreement to some other person, if it should be expedient.

(*d*) *Thomas v. Williams*, 1 A. & E. 685.

(*e*) *Reid v. Explosives Co.*, 19 Q. B. D. 264. But circumstances may exist, as where the business is continued after the winding-up order, showing that this notice of discharge has been waived, or that a new agreement of service has been made: *Re English Joint Stock Bank, ex parte Harding*, L. R. 3 Eq. 341; *Re Forster*, 19 L. R. Ir. 240.

(*f*) *Re General Rolling Stock Co.; Chapman's Case*, L. R. 1 Eq. 346; *Re Oriental Bank, McDowall's Case*, 32 Ch. D. 366.

(*g*) *Reigate v. Union Manufacturing Co. (Ramsbottom), Ltd.*, [1918] 1 K. B. 592, explaining the decision of Warrington, J., in *Midland Counties District Bank, Ltd. v. Attwood*, [1905] 1 Ch. 357, dissenting from a *dictum* to the contrary effect by Lord Romilly, M.R., in *Re Imperial Wine Co., Shirreff's Case*, L. R. 14 Eq. 417.

(*h*) As to the computation of time, see *Ex parte Fox, Re Smith*, 17 Q. B. D. 4.

them" (i). Provision is made for similar preferential payments on the winding up of a company by section 209 of the Companies (Consolidation) Act, 1908 (8 *Edw. VII. c. 69*) (k).

The secretary of a company may be a "clerk or servant" within the above provisions, but it was held that a secretary of a company whose normal duties were in fact done by a clerk whom he paid was not within those provisions, the priority given by the section being intended to apply to wages due in respect of personal services (l). Contributors to a periodical paper are not servants within the meaning of the preferential payments section of the Companies (Consolidation) Act, 1908 (m); but, on the other hand, it was held that an analytical chemist engaged at a weekly wage to produce certain formulæ; was, under the terms of his contract, a clerk or servant within section 209, and entitled to priority in respect of wages due (n).

The following persons have been held to be entitled to preferential payments as clerks or servants under previous Bankruptcy Acts: the mate of a vessel (o), a French teacher in a school (p), and a traveller, engaged at an annual salary (q); but a traveller paid by commission is not entitled to preferential payment (r). A managing director (s) has been held not to be a servant of a limited company within the meaning of this enactment.

Where employers made deductions from their workmen's wages which were not valid deductions under the Truck Act, 1831, and the employers afterwards became bankrupt, it was held (t) that, there having been no valid payment of their wages, the workmen were entitled to be paid in full out of the bankrupts' estate the amount of the deductions, as unpaid wages.

The provision as to clerks is not limited to trade clerks, nor is it

(i) Under former Bankruptcy Acts it has been held that to come within provisions somewhat similar to those above set out, which are now in force, the engagement of a servant must have been of a more permanent nature than a weekly hiring. *Ex parte Collyer*, 2 Mont. & A. 29; *Ex parte Crawfoot*, Mont. 270; *Ex parte Grellier*, Mont. 264. But as the wages of a labourer or workman, "whether payable for time or for piece-work," are now entitled to priority, those decisions probably would not now be applicable. And under section 32 of the Bankruptcy Act, 1869, it was necessary that the servant should have been "in the employment of the bankrupt at the date of the order of adjudication," so that it was held that a music master and a drill sergeant engaged by the term to attend a school twice a week at a fixed payment per hour or per lesson were not entitled to preferential payment. *Ex parte Walter, Re Heath*, L. R. 15 Eq. 412. But there are no corresponding words in the Act now in force.

(k) For the position when there is first a voluntary winding-up and then a compulsory order, see *Re Havana Exploration Co., Ltd., Nathan's Claim*, [1916] 1 Ch. 8.

(l) *Cairney v. Back*, [1906] 2 K. B. 746.

(m) *Re Beeton & Co., Ltd.*, [1913] 2 Ch. 279; *Re Ashley and Smith, Ltd.*, [1918] 2 Ch. 378.

(n) *Re Morison & Co.*, 106 L. T. 731.

(o) *Ex parte Homborg*, 2 Mont. D. & D. 642.

(p) *Ex parte Collinet*, 1 Bank. & Ins. Rep. 82.

(q) *Ex parte Neal*, Mont. & M. 194.

(r) *Ex parte Simmons*, 30 L. T. (O. S.) 311.

(s) *Re Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349.

(t) *Ex parte Cooper, Re Morris*, 26 Ch. D. 693.

necessary that the trading should have continued during the whole of the period for which wages are claimed (*u*).

A trader borrowed £550 under an agreement, by which the lender was to become his clerk at a salary of £222 10s. per annum. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end; the lender to have the option of becoming a partner. The trader became bankrupt, and it was held that the lender was a clerk, and entitled to three months' salary in full, under 12 & 13 *Vict. c. 106, s. 168*; and, also, that his having been absent from business, owing to ill health, for the three months immediately preceding the bankruptcy, with the bankrupt's leave, did not take away this right (*x*).

A. entered the service of B., as bookkeeper and cashier, in 1844, and remained till December, 1848, without any agreement being made as to the amount of his salary, but he drew small sums from time to time. A. stated that in December, 1848, it was agreed between him and B. that his salary should be at the rate of £250 per annum from 1844, and that the reason why no arrangement was made before was, that B. was making experiments in a manufacture, from which he hoped to derive a large fortune, out of which A. expected to be paid. B. became bankrupt in February, 1849, and A. was allowed to prove as a clerk for his salary (*y*).

Where coal proprietors employed colliers to whom work was let off at so much per score baskets, and each collier had a drawer attached to him, it was held that as the drawers could not have maintained an action against the proprietors for their wages they were not entitled to wages under 12 & 13 *Vict. c. 106, s. 169 (z)*.

In the event of a company being wound up under the Companies (Consolidation) Act, 1908, all debts payable on a contingency and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are by section 206 of that Act admissible to proof against the company (*a*). But this provision does not give a servant any claim which would imply a right to control the business or to determine its extent.

So where a company engaged M. to act as their agent for five years at a fixed salary, and also for a commission of ten per cent. on the net profits in each year, and the company was wound up before the end of the five years, it was held that M. was not entitled to prove against the company for any compensation for loss of commission during the unexpired part of the five years (*b*). But in another

(*u*) *Ex parte Gough*, Mont. & B. 417.

(*x*) *Ex parte Harris*, 1 De G. 165.

(*y*) *Ex parte Hickin*, 19 L. J. Bank. 8.

(*z*) *Ex parte Ball*, 3 De G. M. & G. 155.

(*a*) See e.g., *Re English Joint Stock Bank, Yelland's Case*, L. R. 4 Eq. 350, followed in *Re London and Colonial Bank, Ex parte Clark*, L. R. 7 Eq. 550.

(*b*) *Re English and Scottish Marine Insurance Co., Maclure's Claim*, L. R. 5 Ch. 737; *Re R. S. Newman, Ltd., Raphael's Claim*, [1916] 2 Ch. 309.

case (c), where a company engaged D. and G. to act as their commercial travellers for three years in a certain district, but was wound up before the end of the three years, Bacon, V.-C., held that D. and G. were entitled to compensation in respect of commission for the unexpired part of the three years, distinguishing the case from *Maclure's Case* on the ground that "here the only remuneration is called a commission, and in the other case it was called salary and commission."

Dissolution of Partnership.—A dissolution of partnership may occur in consequence of the death of one of the partners, but whether such a dissolution would be a breach of a contract by the firm to employ a servant for a definite period must depend on the intention of the parties as expressed in the contract. It may be that the contract was of such a personal nature that its intention must be taken to have been that its continuance should be subject to all the parties thereto remaining alive (d). But where a servant entered into a contract with "the Alhambra Palace Company," which was in fact a partnership of three persons, and the servant was not aware of that fact when he entered into the contract with them, it was held that the contract of service was not of such a personal nature as to be put an end to by the death of one of the three partners (e).

A dissolution of partnership by the retirement of one or more of the partners during the currency of a contract of service constitutes a wrongful dismissal of a servant. A partnership of four agreed to employ B. for a term of two years. He entered upon the service, and shortly afterwards two of the partners retired, and the business was transferred to the other two, who continued it under the same name. It was held by the Court of Appeal (Lord Esher, M.R., dissenting) that the dissolution of the partnership operated as a wrongful dismissal of B (f). On the other hand, where a person entered into the service of a firm as manager for seven years, and shortly afterwards, upon a change in the firm, signed a memorandum, "In consideration that a new agreement is entered into with the new firm at a salary of £180 a year, I am willing to cancel the present agreement with C. and M." (the old firm), and afterwards continued in the service of the new firm from August to April at a salary of £180 a year, and the jury found that there was a new agreement with the new firm, it was held, in an action against C. and M. for wrongful dismissal, that the new agreement was an implied surrender of the first and evidence of exoneration before breach (g).

(c) *Re Patent Floor Cloth Co., Dean and Gilbert's Claim*, 41 L. J. Ch. 476.

(d) *Tasker v. Shepherd*, 6 H. & N. 575; *Hoey v. McEwan*, 5 Macph. (Ct. Sess. Cases), 814.

(e) *Phillips v. Alhambra Palace Co.*, [1901] 1 K. B. 59.

(f) *Brace v. Calder*, [1895] 2 Q. B. 253.

(g) *Hobson v. Cowley*, 27 L. J. Ex. 205. Compare *Dobbin v. Foster*, 1 C. & K. 323.

Upon a dissolution of partnership an apprentice cannot, in the absence of stipulations to the contrary, be required to serve the remaining partners (*h*).

Death of Master.—By the death of the master the contract is at an end, and the servant is discharged (*i*) unless the contrary is stipulated by the terms of the contract (*k*); and the sureties to a bond for the faithful service of the servant are released (*l*). This statement applies as a general rule to a contract of apprenticeship, so far as it is a personal contract (*m*), but the general rule may be excluded by an agreement between the parties that the apprentice shall continue with his master's executors (*n*), or by custom (*o*). And it seems that where there is no custom upon the subject which can be imported into the contract, and the service is under an entire contract for a year's service and a year's pay, if the master dies in the middle of the year the servant is not legally entitled to any wages for a broken period of service.

Thus, where (*p*) plaintiff declared in debt upon a writing, by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him £100 per annum for his service, the plaintiff showed that the defendant's testator died three-quarters of a year after, during which time he served him, and he demanded £75 for three quarters; after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent, that it being one consideration and one debt, it could not be divided; and the Court of King's Bench were of that opinion, and reversed the judgment.

Where, however, there is a custom applicable to persons in the

(*h*) *Brook v. Dawson*, 20 L. T. 611; *Couchman v. Sillar*, 22 L. T. 480; *Lloyd v. Blackburn*, 9 M. & W. 363. See also *Popham v. Jones*, 13 C. B. 225; *R. v. St. Martin's, Exeter (Inhabitants)*, 2 A. & E. 655.

(*i*) *Wentw. Off. Ex.* 141, 14th ed.; *Wms. Exors.*, 11th ed., 627. But it was held that a pauper gained a settlement by serving out the year with the executors of the master, who died in the middle of the year; on the ground that the service to the executors was a continuance of the same service and not a new contract: *R. v. Ladock*, *Burr.*, S. C. 179; *Jackson v. Bridge*, 12 Mod. 650. It may be convenient to mention here that if A. hires B. to serve C. and C. dies, B. is only entitled to wages up to the time of C.'s death; *Taylor v. Caldwell*, 3 B. & S. 826.

(*k*) *Farrow v. Wilson*, L. R. 4 C. P. 744.

(*l*) *Barker v. Parker*, 1 T. R. 287.

(*m*) *R. v. Peck*, 1 Salk. 66; *Baxter v. Burfield*, 2 Str. 1266; *Bac. Abr.* "Master and Servant," G.

(*n*) In some cases the master's business may be of such a nature that it would be impossible for his executors to teach it as he himself could, but an apprentice may well be bound to a trader and his executors, provided that they carry on the same trade in the same place, and whether such an agreement be binding or not upon the infant will depend upon whether the Court should be of opinion that at the time the agreement was made it was on the whole beneficial to him: *Cooper v. Simmons*, 7 H. & N. 707, per Martin, B.

(*o*) *Bac. Abr.* "Master and Servant," E.

(*p*) *Countess of Plymouth v. Throgmorton*, 1 Salk. 65; see *Elderton v. Emmens*, 6 C. B. 160.

situation in which the servant was, as there is with regard to domestic servants, who are generally considered entitled to wages for the time they serve, though they do not continue in the service during the whole year (*q*), the servant would probably be held entitled to recover wages for the period of actual service. And it is conceived that in all cases where the contract is not an entire contract for a whole year's service on one side, and a whole year's pay on the other, a servant, whose master dies in the middle of a year, might recover his wages for the broken period of service, upon principles similar to those which allow a servant, wrongfully discharged, to treat the contract as rescinded, and sue for his wages for the period of actual service (*r*).

The Apportionment Act (4 & 5 Will. IV. c. 22), would not in general apply to cases of hiring and service (*s*).

No part of the apprenticeship premium is recoverable on the ground of partial failure of consideration on the death of the master unless stipulations for return of the whole or part of the premium are contained in the contract (*t*). So if a solicitor dies, his estate is not liable for the return of any part of the premium paid in respect of an articulated clerk (*u*).

In a proceeding in a Court of summary jurisdiction in relation to a dispute between a master and an apprentice, the Court has power, under the Employers and Workmen Act, 1875 (*x*), to rescind the instrument of apprenticeship and order the whole or part of the premium to be repaid.

The executors or administrators of their master are the persons to whom servants must look for payment of their wages, after his decease.

It is stated by some authorities (*y*), that the wages of domestic servants and of labourers are entitled to preference over other debts of the deceased. But it is difficult to point out any legal ground on which such preference can be claimed in England (*z*), though they are entitled to priority in France (*a*).

The subject of legacies to servants, and how far such legacies operate

(*q*) *Cutter v. Powell*, 6 T. R. 320, per Lawrence, J.

(*r*) *Ante*, p. 116.

(*s*) *Lowndes v. Earl of Stamford*, 18 Q. B. 425.

(*t*) *Whincup v. Hughes*, L. R. 6 C. P. 78; where the Court expressed disapproval of the decision of Lord Cottenham, who had taken the contrary view in the case of an articulated clerk to an attorney, in *Hirst v. Tolson*, 2 Mac. & G. 134.

(*u*) *Ferns v. Carr*, 28 Ch. D. 409.

(*x*) 38 & 39 Vict. c. 90, s. 6.

(*y*) 2 Bl. Comm. 511, citing 1 Roll. Abr. 927.

(*z*) 2 Wms. Exors. 875, 9th ed. It may be here mentioned as a caution to servants, that upon the death of their master the only persons entitled to deal with his personal property are his legal personal representatives, that is, his executors, if he has left any; or, if not, his administrators; and that in a case where a housekeeper, on her master's death, without leaving any executors, applied certain cash in the house, and the produce of the sale of some of her master's property, to the payment of the expenses of his funeral and other expenses, without any authority to do so, she was afterwards held liable to an action at the suit of the widow and administratrix for the money so received and applied: *Welchman v. Sturgis*, 13 Q. B. 552.

(*a*) Code Civ. liv. iii. tit. xviii. ch. ii. s. 1, 2101.

to extinguish the servant's claim to wages, will be treated of hereafter in a separate Chapter (b).

Where a farm servant left his wages from time to time in his master's hands, and it was agreed between them that the debt thus due should carry interest, and the master died, having by his will given all his real and personal property to his wife, out of which he desired that she would discharge all his legal debts; it was held, in a suit for the administration of his estate in Chancery, that the Statute of Limitations did not operate as a bar to arrears of interest upon the sum left by the servant in his master's hands (c).

Effect on Contract of Service of Default or Death of Servant.

Default of Servant.—When a servant, whose wages are due periodically, refuses to perform his part of the contract, and serve his master in the manner contracted for, or so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last periodical payment of wages (d). That is to say, if a servant whose wages are only due yearly abscond from his master, or is rightfully discharged before the expiration of the year, he could recover nothing for services rendered previous to such departure or discharge. And the same principle would apply to the case of a quarterly, monthly or weekly hiring. In any of such cases, if the servant fail to perform his part of the contract, or be rightfully discharged (e) at any intervening period between the days when his wages are due, he can recover nothing for the broken period of service. This is upon the principle that the contract was an entire contract, and the performance of the service for the whole time agreed upon was in the nature of a condition precedent to the right to recover any wages. It is a general rule, applicable to all contracts, that (f) where the plaintiff has contracted to do an entire work for a specific sum he can recover nothing unless the work be done, or it can be shown that it was

(b) See Chapter IX., p. 342, *post*.

(c) *Blower v. Blower*, 28 L. J. Ch. 181.

(d) See Dalt. Just. ch. 58, p. 129, where it is said, "If a servant of his own accord shall depart from his master before his time expired, he shall lose all his wages": *Walsh v. Walley*, L. R. 9 Q. B. 367; *Saunders v. Whittle*, 33 L. T. 816; *Gregson v. Watson*, 34 L. T. 143. Where by the rules of a cotton mill any person absenting himself was to give notice to the overlooker, and in default all wages then earned were to be forfeited, and a weaver having obtained leave for half a day, promising to return next morning, did not return till the afternoon, she was held not to forfeit her wages: *Taylor v. Carr*, 30 L. J. M. C. 201.

(e) *Ante*, p. 73.

(f) *Appleby v. Myers*, L. R. 2 C. P. 651, followed in *Forman & Co. Proprietary Ltd. v. Liddesdale*, [1900] A. C. 190. So in *The Madras*, [1898] P. 90, where the plaintiffs agreed to tow the defendant's ship from K. to S. for a fixed sum, but the fulfilment of their agreement became impossible owing to circumstances for which neither party was to blame, it was held that the plaintiffs were not entitled to recover on a *quantum meruit* for any portion of the towage. And see note to *Cutter v. Powell*, 2 Sm. L. C. 1.

the defendant's fault that the work was incomplete (*g*), or that there is something to justify the conclusion that the parties have entered into a fresh contract (*h*).

Thus in an action (*i*) for wages for work performed by the plaintiff, who was a seaman on board the defendant's ship during a voyage from Altona to London, where it appeared that the service was under an agreement, by which the plaintiff agreed to serve from Altona to London and back again, and there was an express stipulation, by which the plaintiff was bound to demand no wages till the conclusion of the voyage, the plaintiff was nonsuited on the ground that the contract remained unperformed and unrescinded, and the nonsuit was held right by the Court of King's Bench.

Upon similar principles, in a variety of cases, servants who have been rightfully discharged, and have afterwards sued their late masters for wages, have failed to recover anything.

Thus, in an action (*k*) brought by a yearly servant to a farmer to recover wages for his service from Michaelmas to July, when he was discharged under circumstances which were held to justify his discharge, it was held that he could not recover anything. And Lord Ellenborough said: "If the contract be for a year's service, the year must be completed before the servant is entitled to be paid." Lord Tenterden afterwards, on two occasions (*l*), expressed a similar opinion. And, upon the authority of these cases, Lord Denman nonsuited a servant who, having been properly discharged (as was admitted), afterwards brought an action for wages during a broken period of service, and the nonsuit was held right by the Court of King's Bench (*m*). The principle on which these cases were decided, was afterwards (*n*) applied to the case of a clerk of a public company, whose salary had been paid quarterly, and who, having been discharged for improper conduct some little time after the quarter-day, was held not to be entitled to recover anything for the period which had elapsed since the last periodical payment of his salary. In his judgment, in that case, Lord Denman said: "*Turner v. Robinson*, and many other cases, have shown that if a party hired for a certain time so conduct

(*g*) *O'Neil v. Armstrong & Co.*, [1895] 2 Q. B. 418. There the plaintiff contracted with the defendants, as agents for the Japanese Government, to serve as one of the crew on board a Japanese warship from the Tyne to Yokohama for a fixed sum. On the voyage war was declared by Japan against China, and the plaintiff thereupon refused to continue to serve. In an action by him for wages it was held that as the declaration of war by the defendants' principals would expose the plaintiff to greater risks than he had contracted to run, he was justified in leaving the ship, and claiming his stipulated wages.

(*h*) As to the evidence necessary to support a claim founded on a new implied contract, see *Sumpter v. Hedges*, [1898] 1 Q. B. 673.

(*i*) *Hulle v. Heightman*, 2 East, 145; *Beale v. Thompson*, 4 East, 546; *Appleby v. Dods*, 8 East, 300; *Jesse v. Roy*, 1 C. M. & R. 316.

(*k*) *Spain v. Arnott*, 2 Stark. 256.

(*l*) *Huttman v. Boulnois*, 2 C. & P. 510; *Atkin v. Acton*, 4 C. & P. 208.

(*m*) *Turner v. Robinson*, 5 B. & Ad. 789.

(*n*) *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171.

himself that he cannot give the consideration for his salary, he shall forfeit the current salary even for the time during which he has served."

And in a subsequent case (o), in which an action was brought by a waggoner and servant in husbandry (who left his work and was afterwards summoned before a magistrate under the statute (now repealed) 4 *Geo. IV. c. 34, s. 3*, and by him discharged from the service) against his master, it was held that he could not recover wages for the time of his actual service, as he was bound to give a whole year's service before earning any wages, and broke his contract by leaving the service before the year's end.

But default of the servant after the day on which a periodical payment of wages accrued due would not deprive him of his right to recover such periodical payment—would not divest a vested right. In a case (p), therefore, in which it was part of the engagement of the plaintiff that he should remain in charge of a vessel which was to sail on a trading and exploring expedition to the Niger during the whole voyage; but the pay was to be "a fixed pay of £50 per month," and the plaintiff in the middle of the voyage refused to proceed; the Court held that he was entitled to recover the monthly wages which accrued before his refusal; Pollock, C.B., saying, "There 'per month' means 'each month,' or 'monthly,' and gives a cause of action as each month accrues, which, once vested, is not subsequently lost or divested by the plaintiff's desertion or abandonment of his contract. The words are plain, and no mercantile man could doubt what was meant. But further, if this meaning is not given, the result would be that had the plaintiff died or the voyage failed at the last moment, nothing would be payable by the defendant, because, according to his contention, the performance of the entire work contracted for was a condition precedent to the right to receive anything."

And a similar decision was given in another similar case (q), where the ship's articles provided for "amount of wages per calendar month"; and the plaintiff recovered, although he was left behind, through his own negligence, at one of the places at which the ship stopped before the completion of the voyage.

So also where an employee at an annual salary payable monthly, was justifiably dismissed and his contract of service terminated on October 22, for misconduct which took place prior to May in the same year, and his employers refused to pay him salary from May onwards, it was held that he was entitled to recover salary for the months actually served, that is to say, up to the end of September, but not for any part of October (r).

(o) *Lilley v. Elwin*, 11 Q. B. 742.

(p) *Taylor v. Laird*, 1 H. & N. 267.

(q) *Button v. Thompson*, L. R. 4 C. P. 330; explained in *Saunders v. Whittle*, 33 L. T. 816. See also *Stubbs v. Holywell Railway Co.*, *post*, p. 137.

(r) *Healey v. Société Anonyme Française Rubastic*, [1917] 1 K. B. 946.

And on the County Court Judge's finding that a coal miner's wages were due as earned on the completion of each shift, although payable fortnightly, it was held that wages in respect of four days subsequent to the previous pay-day were recoverable by the miner, although he had been dismissed for refusing to continue at work after those four days (s).

By the Army Act, 1881 (t), it is enacted, “(1) A soldier of Her Majesty's regular forces shall not be liable to be taken out of Her Majesty's service by any process, execution, or order of any Court of law or otherwise; or to be compelled to appear in person before any Court of law, except in respect of the following matters, or one of them (that is to say)—

“ (a) On account of a charge of or conviction for crime; or

“ (b) On account of any debt, damages, or sum of money when the amount exceeds £30 over and above all costs of suit.

“ (2) For the purposes of this section a crime shall mean a felony, misdemeanor or other crime or offence punishable, according to the law in force in that part of Her Majesty's dominions in which such soldier is, with fine or imprisonment or some greater punishment, and shall not include the offence of a person absenting himself from his service or neglecting to fulfil his contract, or otherwise misconducting himself respecting his contract.”

But there seems to be no provision in the Army Act, as there was formerly in the Mutiny Act (u), authorising the justice before whom a recruit is attested to adjudge him a reasonable proportion of his wages for the time he has actually served.

Death of Servant.—The executors of a servant are not liable upon a contract for personal services, there being an implied condition in such contracts, that if the servant shall die this contract shall be considered as discharged. Blackburn, J., in a case (x) that has frequently been cited with approval used the following words: “There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, *c.g.*, promises to marry or *promises to serve for a certain time*, are never in practice qualified by an express exception of the death of the party; and therefore, in such cases, the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined, that if the performance is personal the executors are not liable: *Hyde v. Dean of Windsor* (y). See 2 Williams on Executors, 1560, 5th ed.,

(s) *Parkin v. South Hetton Coal Co.*, 98 L. T. 162. See also *George v. Davies*, [1911] 2 K. B. 445.

(t) 44 & 45 Vict. c. 58, s. 144, and see sect. 96 as to apprentices and indentured labourers in a colony.

(u) See 22 Vict. c. 4, s. 63.

(x) *Taylor v. Caldwell*, 3 B. & S. 826

(y) Cro. Eliz. 552.

where a very apt illustration is given. 'Thus,' says the learned author, 'if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its nature, and by the intervention of the contractor's death has become impossible to be performed.' For this, he cites a *dictum* of Lord Lyndhurst in *Marshall v. Broadhurst* (z), and a case mentioned by Patteson, J., in *Wentworth v. Cock* (a). In *Hall v. Wright* (b), Crompton, J., in his judgment, puts another case. 'Where a contract depends upon personal skill, and the act of God renders it impossible; as, for instance, in the case of a painter employed to paint a picture, who is struck blind, it may be that the performance might be excused.' It seems that in those cases the only ground on which the parties or their executors can be excused from the consequences of the breach of contract is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor; and perhaps, in the case of the painter, of his eyesight. In the instances just given the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor; but that does not seem in itself to be necessary to the application of the principle, as is illustrated by the following example: In the ordinary form of an apprentice deed, the apprentice binds himself in unqualified terms to 'serve until the full end and term of seven years be fully complete and ended,' during which term it is covenanted that the apprentice his master 'faithfully shall serve'; and the father of the apprentice, in equally unqualified terms, binds himself for the performance by the apprentice of all and every covenant on his part (see the form 2 Chitty on Pleading, 342). It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father. Yet the only reason why it would not is that he is excused because of the apprentice's death (c). These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing."

His lordship gave several examples, and added: "The principle seems to us to be, that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the

(z) 1 Tyrw. 349.

(a) 10 A. & E. 45; 8 L. J. Q. B. 230.

(b) E. B. & E. 746; 27 L. J. Q. B. 345.

(c) See *Boast v. Firth*, L. R. 4 C. P. 1.

performance; but that excuse is by law implied, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

Where the death of a servant prevents his performing his part of the contract, and completing the period of service agreed upon, and by the terms of his contract his wages were to be paid only at the end of his term of service, his representatives can recover nothing for the broken period of service.

Thus (*d*) where P., being at Jamaica, subscribed and delivered to C. the following note:—"Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool." C. went on board, and did his duty from 31st July to 20th September, when he died before the ship reached Liverpool. His representative brought an action for his wages for the period during which he had served, but it was held that, C. not having completed the voyage, his representative could not recover any wages. And Ashurst, J., said:—"Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything: it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question; the intestate did not perform the contract on his part; he was not indeed to blame for not doing it, but still, as this was a condition precedent, and he did not perform it, his representative is not entitled to recover." And Lawrence, J., added:—"So, if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether upon the terms of the contract itself, she cannot recover anything."

Though the death of the servant dissolves the contract of service, it does not divest the servant's personal representative of rights already accrued. An engineer was engaged for the performance of a certain piece of work which it was calculated would occupy fifteen months and for which he was to receive £500, to be payable in five equal quarterly instalments. He was paid £100 at the end of the first quarter, and after continuing his work he died in the middle of the fourth quarter. It was held that his death did not throw his adminis-

(*d*) *Cutter v. Powell*, 6 T. R. 320; 2 Smith's L. C. 1. The rights of seamen in respect of their wages are now governed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 50), s. 155 and following sections and Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), ss. 37-39. See *Appleby v. Myers*, L. R. 2 C. P. 651, where the plaintiff, who contracted to erect certain machinery, was held not entitled to recover for part which was burnt down before the whole was completed.

trator back upon a right of receiving on a *quantum meruit* only, but that the administrator was entitled to recover the two stipulated quarterly payments due to the deceased at the time of his death. (e).

Of the Master's Duty to supply Food and Medicine to the Servant.

At common law the duty of a master or mistress to supply food and other necessities to their servants arises solely from a contract, either express or implied, on their part to do so. And the omission to perform this duty was formerly merely a breach of contract, for which they were civilly, but not criminally, liable, except in the case of a servant of tender years (f). But at a meeting of all the judges (except Lord Kenyon and Rooke, J.), held 25th February, 1802, the general opinion was, that it was an indictable offence as a misdemeanour to refuse or neglect to provide sufficient food, bedding, &c., to any infant of tender years unable to provide for and take care of itself (whether such infant were child, apprentice or servant), whom a man was obliged by duty or contract to provide for, so as thereby to injure its health (g).

In the case of the Sloanes, who were indicted in February, 1851, upon a charge of starving and otherwise ill-treating their servant-girl, who was sixteen years old, the learned judges who tried the case considering that she was not of tender years, that part of the charge was abandoned (h). In consequence of the great scandal caused by the Sloanes' case the statute 14 & 15 Vict. c. 11 was passed (i). That Act was partly repealed in 1861, when the statutes relating to criminal law were consolidated. But its provisions were, at the same time, substantially re-enacted by the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 26 (k), whereby it is made a misdemeanour (l) for any person

(e) *Stubbs v. Holywell Railway Co.*, L. R. 2 Ex. 311.

(f) *R. v. Ridley*, 2 Camp. 650.

(g) *Friend's Case*, Russ. & Ry. 20. If, however, a mistress culpably neglects to supply proper food and lodging to her servant at a time when the servant is reduced to such an enfeebled state of body or mind as to be helpless, and unable to take care of herself, or is so under the dominion and restraint of her mistress as to be unable to withdraw herself from her control, and the death of the servant is caused or accelerated by such neglect, the mistress is liable to be convicted of manslaughter: *R. v. Smith*, 34 L. J. M. C. 153; *R. v. Instan*, [1893] 1 Q. B. 450. It was held in *R. v. Saunders*, 7 C. & P. 277, that a married woman could not be convicted of a misdemeanour in neglecting to supply even an infant servant with proper food, unless it be shown that her husband supplied her with food to give the child, and she wilfully neglected to give it. The omission to provide food was the omission of the husband, the wife being in the nature of a servant to the husband.

(h) The defendants pleaded guilty to the charge of assaulting, &c., the servant, and were punished for that.

(i) The Poor Law (Apprentices, &c.) Act, 1851. (See Chitty's Statutes, tit. "Master and Servant.")

(k) See also sect. 12 of the Children Act, 1908 (8 Edw. VII. c. 67).

(l) Summary convictions for similar offences are provided for in sect. 6 of the Conspiracy and Protection of Property Act, 1875, for which see Chitty's Statutes, tit. "Societies (Trade Unions)."

legally liable to provide apprentices or servants with necessary food, clothing, or lodging, wilfully or without lawful excuse to omit to do so; or unlawfully and maliciously to do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered or the health permanently injured.

A master is legally bound to provide medical attendance for an apprentice (*m*), but not for a servant, in case of illness or accident (*n*). Lord Kenyon, indeed, was of opinion (*o*) (and it was said by Lord Alvanley (*p*), that he had reason to believe that that was not a hasty opinion, but formed upon reflection) that "a master was obliged to provide for his servant in sickness and in health; and that he, therefore, was liable for medicines furnished to his servant while in his service. Not that his servant was at liberty to go abroad and contract debts for medicines, but that whilst he was under his master's roof the master was under a legal as well as a moral obligation to provide the necessary medicines, and to pay for such as were administered to his servant under such circumstances." And Lord Eldon (*q*) seemed disposed to follow Lord Kenyon's opinion. But subsequent decisions have laid down a different doctrine, and it may now be considered as established law that a master is not bound to provide medical advice for his servants, and that it makes no difference whether or not the servant be living under his master's roof. The first formal decision upon this point was made in the case of *Wennall v. Adney* (*r*), which was an action by a surgeon to recover the amount of his bill for medical attendance upon a servant of the defendant, who had his arm broken while driving the defendant's team, and who had been hired by the defendant at the yearly wages of £3 10s. and victuals. The defendant had made no express promise to pay the plaintiff, and it was held that there was no implied promise on his part to do so; and therefore the plaintiff was nonsuited, and the nonsuit was afterwards held right by the Court of Common Pleas. In giving judgment, Lord Alvanley, C.J., after stating his concurrence with the learned judge who tried the case, in thinking the defendant not liable, said that, "previous to the case of *Scarman v. Castell*, there is no authority in the law of England to be found which warrants the position contended for on the part of the plaintiff." And Heath, J., observed, "I believe that the humanity of Lord Kenyon misled him when he adopted the doctrine upon which he decided the case of *Scarman v. Castell*. Probably, at the moment,

(*m*) *R. v. Smith*, 8 C. & P. 153.

(*n*) The case of seamen on board a ship is provided for by the Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), ss. 34, 35.

(*o*) *Scarman v. Castell*, 1 Esp. 270.

(*p*) In *Wennall v. Adney*, 3 B. & P. 247, at p. 252.

(*q*) *Simmons v. Wilmott*, 3 Esp. 91, at p. 93.

(*r*) 3 B. & P. 247. Lord Mansfield had indeed at *Nisi Prius* held that a master was not legally bound to repay the parish for the cure of his servant: *Newby v. Wiltshire*, 2 Esp. 739; 4 Doug. 284. But the case in the text is the first decision *in banc* upon the subject.

it occurred to him that if the master was not bound to provide medical assistance for his servant, the latter would be left wholly destitute: but I am perfectly sure it is more for the advantage of servants that the legal claim for such assistance should be against the parish officers rather than against their masters, for the situation of many masters who are obliged to keep servants is not such as to enable them to afford sufficient assistance in cases of serious illness." And Rooke, J., added, "It must be left to the humanity of every master to decide whether he will assist his servant according to his capacity or not."

Since the case of *Wennall v. Adney*, it has never, it is believed, been seriously contended that any legal liability exists on the part of the master to supply medical assistance for his servants, but in the few cases which have happened at Nisi Prius it has usually been contended, on the part of the plaintiff, that the master has by his conduct rendered himself liable, either by calling in his own usual medical attendant, or by recognising the employment of the medical man called in by the servant. Therefore (s), in an action for the amount of a surgeon's bill, which contained a charge of 7s. 6d. for attending a servant of the defendant named Read, who had hurt her ankle in getting over a gate; and also a charge of £12 for attending one Parry, who had acted as wet-nurse to two of the defendant's children; the defendant was held not liable to pay the former charge, as the plaintiff was not the regular medical attendant of the family, and had been employed by Read without the knowledge of her master or mistress. But the latter charge the defendant was held liable to pay: as it appeared that Parry's illness arose from suckling the defendant's youngest child, and his wife knew of the plaintiff's attendance but did not express any disapprobation of it; although it also appeared that the defendant did not know the plaintiff, and had sent the surgeon who regularly attended his family to see Parry, and had also sent her 10s. to pay for medicines; Mr. Justice Taunton considering that his doing so showed that he considered himself liable to take care of her in that illness, and that it must be taken that the wife had the general superintendence of the house.

It is believed, however, that no case has yet occurred in which the question has arisen in an action by a servant against his master, who had agreed to supply the servant with necessary food, whether the master in such case is bound by his contract to furnish physic to the servant in case of illness. But when the question shall arise, the decision of it must depend upon the exact nature of the contract entered into. "Sometimes a master engages to supply his servant with necessary victuals, and it may be argued that necessary victuals means such victuals as may suit the state of health or infirmity in

(s) *Cooper v. Phillips*, 4 C. & P. 581; *Sellen v. Norman*, 4 C. & P. 80.

which the servant happens to be; as if a servant be in need of wine or victuals of that description which are given by way of medicine" (t).

Regard must now be had to the National Health Insurance Acts, 1911 to 1921, by which, with certain exceptions, persons employed under a contract of service or apprenticeship and paid at a rate below a stated amount, become "insured persons," and as such entitled (*inter alia*) to "medical benefit," the cost being met out of a fund to which employers, insured persons and the Treasury contribute.

Of the Master's Duty to indemnify the Servant from the Consequences of obeying his Orders.

In some cases in which a servant incurs loss or damage in the course of his employment he may recover from his master the amount of the loss or damage upon a contract of indemnity, to be implied from the contract of service; and where an action of libel was brought against the editor of a newspaper in respect of an article which had been published therein by the express orders of the proprietors of the newspaper, who were an incorporated association of nurses, it was held that, apart from any question of the editor's right to be indemnified by the association, the funds of the association could be lawfully applied in undertaking the defence of the action (u). Larger remedies have been given to workmen by statute, as by the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1906.

It is thus the duty of a master to indemnify his servant from the consequences of doing, in obedience to his master's orders, any act pursuant to orders which he was bound to obey or any act which was either lawful in itself, or which, not being apparently in itself unlawful, might have been either lawful or unlawful, but which the servant was induced by the conduct of his master to believe to be lawful, as the rule that one wrongdoer cannot sue another for contribution (x) would not apply in such cases (y).

Thus, if a servant, in obedience to the command of his master, commit a trespass upon the property of another, not knowing that he is

(t) *Wennall v. Adney*, 3 B. & P. 247, per Lord Alvanley, at p. 253.

(u) *Breay v. Royal British Nurses' Association*, [1897] 2 Ch. 272. See also *Hickman v. Kent or Romney Marsh Sheepbreeders' Association*, 37 T. L. R. 163.

(x) *Merryweather v. Nixan*, 8 T. R. 186. The rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act: *Palmer v. Wick and Pulteneytown Steam Shipping Co.*, [1894] A. C. 318.

(y) *Southern v. How*, Cro. Jac. 468; *Adamson v. Jarvis*, 4 Bing. 66; *Betts v. Gibbins*, 2 A. & E. 57; *Toplis v. Grane*, 5 Bing. N. C. 636; *Collins v. Evans*, 5 Q. B. 820; *Rawlings v. Bell*, 1 C. B. 951; *Childers v. Wooler*, 2 E. & E. 287; *Dugdale v. Lovering*, L. R. 10 C. P. 196. Lord Halsbury, L.C., expressed approval of the proposition that "it is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done": *Sheffield Corporation v. Barclay*, [1905] A. C. 392.

doing any injury; he is answerable for the tort, but he is entitled to an action against his master to recover any damages he may have to pay (z).

And where the defendant employed the plaintiff, who was a brick-maker, to make bricks with R.'s trade-mark, and R. filed a bill in Chancery against the plaintiff, which he compromised, it was held that he might recover from the defendant the costs of the Chancery suit (a).

It was said in an American case: "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and Courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties and to administer justice between them, although both parties are wrongdoers" (b).

But it is conceived that a master is not bound to indemnify his servant from the consequences of an act which is *malum in se*, or which the servant knew to be unlawful, although done by him in obedience to his master's orders, as the servant was not bound to obey his master's orders in such case; and the master is only bound to indemnify an innocent agent. And a master is not bound to indemnify his servant from damage arising in consequence of his acting contrary to his master's order (c): as if a servant entrusted to sell, and expressly ordered not to warrant, does warrant, and suffers damage in consequence (d).

The Master's Liability for Personal Injuries to Servant.

No implied contract exists by which the employer is required to take due and ordinary care not to expose his servant to danger and risk in the course of his employment. Where, therefore, an administratrix sued under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), alleging in her declaration that the deceased entered the defendants' service as porter, on the terms that the defendants would take due and ordinary care not to expose him to extraordinary danger and risk in the course of such employment, and that he was from

(z) *Humphrys v. Pratt*, 5 Bligh. N. S. 154; *Collins v. Evans*, 5 Q. B. 820, at p. 830.

(a) *Dixon v. Fawcus*, 30 L. J. Q. B. 137.

(b) *Lowell v. Boston and Lowell Railroad Corporation*, 23 Pick. 24, at p. 33.

(c) "It seems to me revolting to good sense to say that a man can, under any ordinary circumstances, be said to be discharging his duty to his master in doing that which is in direct disobedience to his lawful orders." Hawkins, J., in *Vickery v. Great Eastern Railway Co.*, 79 L. T. 121. But it is not every breach of a master's orders that would have the effect of terminating the servant's employment so as to excuse the master from the consequences of the breach of his orders: *Whitehead v. Reader*, [1901] 2 K. B. 48, which was a case under sect. 1 of the Workmen's Compensation Act, 1897.

(d) *Southern v. How*, Cro. Jac. 471, per Houghton, J.; see *Grylls v. Davies*, 2 B. & Ad. 514.

want of such care exposed to extraordinary danger and risk, and killed, but did not give any evidence of an express contract on such terms, she was nonsuited, and the nonsuit was upheld by the Court of Exchequer, Martin, B., observing, that he had on several occasions nonsuited plaintiffs in such cases (e).

In ordinary cases where a servant is free (at least theoretically) to choose his master and bargain as to the terms of his service, it has been decided that on his engaging to serve he impliedly (f) undertakes as between himself and his master to run all the ordinary risks (g) of the service, including the risk of negligence on the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both. The master is therefore not in general bound to indemnify him against the consequences of injuries sustained in the ordinary discharge of the duties for which he was hired; that is, at least, if the master provide competent fellow-servants, and tackle and machinery reasonably proper and adapted to the work in hand.

The principle of law which exempts an employer from responsibility to his servant for the consequences of the negligence of another servant in a common employment is now well settled, but it has lost a great deal of the importance which it formerly had. Claims by workmen against their employers for injuries suffered by them in the course of their employment can now generally be brought under the provisions of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), or the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), and in proceedings under these Acts the defence of common employment is not open to the defendant (i).

(e) *Riley v. Barendale*, 30 L. J. Ex. 87.

(f) *Hutchinson v. York, Newcastle and Berwick Railway Co.*, 5 Ex. 343; *Tunney v. Midland Railway Co.*, L. R. 1 C. P. 291. In *Smith v. Steele*, L. R. 10 Q. B. 125, which was an action by a pilot against his employers, who were shipowners, in respect of injuries caused to him by the negligence of the defendants' servants on the ship, it was held that since under the Merchant Shipping Acts the master was compelled to employ a pilot, and the plaintiff was liable to a penalty if he refused to act as pilot when requested, and the rate of his remuneration was fixed by Act of Parliament, there was no ground for implying an agreement between him and his employers that he should take upon himself the risk of injury from negligence of his employers' servants on the ship.

(g) In *Mansfield v. Baddeley*, 34 L. T. 696, where the plaintiff, a dressmaker in the employ of defendant, was asked to go into the kitchen, and was there bitten by a savage dog which was usually tied up, but on this occasion was loose, it was held that the master was liable, as the risk was not an ordinary risk incidental to the service. But in America it has been held that an injury to a pointsman from use of worn-out rails for a siding was an ordinary risk: *Michigan, &c., Railway Co. v. Austin*, 40 Mich. Rep. 247.

(i) But the doctrine of common employment has not been abolished, and it is competent for a workman to make it a term in his contract of service that he will not make any claim against his employer under the Employers' Liability Act, 1880, in respect of personal injuries which he may suffer in the course of his employment: *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357. "Contracting out" is, however, not permissible in respect of the Workmen's Compensation Act, 1906. See section 3 of that Act.

The first reported case in which the question arose was *Priestley v. Fowler* (*k*) in 1837. The plaintiff in that case was a servant of the defendant in his trade of a butcher, and the defendant desired him to go with certain goods of the defendant, in a van belonging to the defendant, and conducted by another servant. The plaintiff accordingly went, but the van, being overloaded, broke down, and the plaintiff, who was riding on it, was thrown off and his thigh broken. It did not appear whether the defendant knew of the defects in, or overloading of, the van; the Court, therefore, was not called upon in that case to decide how far such knowledge on his part of a defect, unknown to the servant, would make him liable. But, under the circumstances, he was held not liable, Lord Abinger, C.B., saying: "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coachmaker, or for a defect in the harness, arising from the negligence of the harness-maker, or for drunkenness, neglect or want of skill in the coachman (*l*); nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to the health; of the builder for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity, of these consequences, afford a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information and belief.

(*k*) 3 M. & W. 1.

(*l*) See what Pollock, C.B., said as to this in *Holmes v. Clark*, 30 L. J. Ex. 135, at p. 138.

The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment especially, which is described in the declaration in this case, the plaintiff must have known, as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly afford. We are, therefore, of opinion that the judgment ought to be arrested."

The next case is an American decision. Two persons were employed by the defendants in their business, the one as an engineer to manage the engines and cars on the road, the other to manage the switches on the railway. The latter, although he was properly selected by the company as a person of due skill and reasonable diligence, negligently put or left a switch across the railway, whereby the engine and cars were thrown off the line, and the engineer was severely injured. He brought an action for the injury sustained against the company, but it was held, upon full argument, that the action was not maintainable (m). Shaw, C.J., in delivering judgment, went into an elaborate examination of the whole subject, which he discussed with great ability (n), and, among other authorities, cited, with approval, the case of *Priestley v. Fowler*.

The next case in England was *Hutchinson v. York, Newcastle and Berwick Railway Company* (o). The nature of the case sufficiently appears from the judgment of Alderson, B., who said: "The question

(m) *Farwell v. Boston and Worcester Railroad Corporation*, 4 Metc. Rep. 49. The judgment is also printed in 3 Macq. 316. This case has been frequently acted upon in America, though it seems that the general doctrine of the immunity of a master from responsibility for injuries received by his servant from a fellow-servant in the same employment has in some cases been carried further by the English than by the American Courts: *Hough v. Railway Co.*, 100 U. S. (10 Otto) 213. But the principle would not apply so as to prevent a servant from recovering for damages sustained by him through an injury to his wife by a fellow-servant's negligence: *Gannon v. Housatonic Railroad Co.*, 17 Amer. Rep. 82.

(n) See per Martin, B., in *Waller v. South Eastern Railway Co.*, 2 H. & C. 102, at p. 111; per Sir Francis Jeune in *The Petrel*, [1893] P. 320, at p. 323.

(o) 5 Ex. 343. This case, it will be observed, is similar to the American case last cited in the text, which happened previously; but, as none of the American cases were cited in it, the judgment is of more value, as showing the concurrent opinion of judges of both countries, unbiased by each other.

is whether the defendants are liable for the injury occasioned to one of their own servants by a collision, while he was travelling in one of their carriages in discharge of his duty as their servant, in respect of which injury they would undoubtedly have been liable if the party injured had been a stranger travelling as a passenger for hire. We think that they are not. This case appears to us to be undistinguishable in principle from that of *Priestley v. Fowler*.” His Lordship then proceeded to state that case; to explain the principle upon which a master is in general liable for accidents resulting from the negligence or unskilfulness of his servant, and to show that a servant could not recover against his master for injury sustained in consequence of his own unskilfulness or negligence. He then continued: “The difficulty is as to the principle applicable to the case of several servants employed by the same master, and an injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible when he has selected persons of competent care and skill. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market; it is admitted that if, by the unskilfulness of A., a stranger is injured, the master is responsible; not so if A., by his unskilfulness, hurts himself; he cannot treat that as the want of skill of his master. Suppose, then, that by the unskilfulness of A., B. the other servant is injured while they are jointly engaged in the same service; there, we think, B. has no claim against the master; they have both engaged in a common service, the duties of which impose a certain risk upon each of them; and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that as between himself and master he would run that risk. Now, applying these principles to the present case, it follows that the plaintiff has no title to recover. H., the deceased (p), in the discharge of his duty as one of the servants of the defendants, had put himself into one of their railway carriages under the guidance of others of their servants, and by the neglect of those other servants, while they were engaged together with him in one common service, the accident occurred. This was a risk which H. must be taken to have agreed to run when he entered into the defendants’ service, and for the consequences of which therefore they are not responsible. The declaration indeed states the accident to have arisen from the combined neglect of the servants who were managing the carriages in which

(p) The action was brought by his administratrix, under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93).

the deceased was travelling, and other of their servants who were managing the train with which the plaintiff's carriage came into collision; and it was argued that this allegation is divisible, and in order to sustain the declaration it would not be necessary to prove any negligence on the part of the train in which H. was travelling; that it would be sufficient to prove negligence on the part of the other train; and so it was contended that even admitting the defendants would not be liable for any neglect on the part of those who were managing the train in one of the carriages of which H. was travelling, yet there could be no principle exempting them from liability for the acts of those who, though equally with H. servants of the defendants, were not at the time of the accident engaged in any common act of service with him. But we do not think there is any real distinction between the two cases. The principle is, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both. The death of H. appears on these pleadings to have happened while he was acting in the discharge of his duty to the defendants as his masters, and to have been the result of carelessness on the part of one or more other servant or servants of the same masters while engaged in their service; and whether the death resulted from mismanagement of the one train or of the other, or of both, does not affect the principle; in any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendants, agreed to run. It may, however, be proper, with reference to this point, to add, that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not, at the time of the injury, acting in the service of his master. In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant. It was contended that the plea in this case (*q*) is bad on special demurrer, as being but an argumentative denial of the cause of action stated in the declaration; but this objection is unfounded. Though we have said that a master is not in general responsible to one servant for any injury occasioned to him by the negligence of a fellow-servant while acting in one common service, yet this must be taken with the qualification that the master shall have taken care not to expose his servants to unreasonable risks. The servant when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to

(*q*) The plea, in substance, was that the collision took place solely by the negligence, &c., of the defendants' servants, who were severally fit and competent persons.

understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care; and the object of the plea in this case is to show that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears not to be open to the objection insisted on. For these reasons we are of opinion that the plaintiff has shown no ground of action, and so our judgment must be for the defendants."

Upon similar principles it was afterwards held, in *Wigmore v. Jay* (r), that a master builder was not liable to an action at the suit of the administratrix (s) of a bricklayer who was killed by reason of the falling of the scaffold on which he was working. The scaffold was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by the men in the employ of the defendant, the deceased not being one of them; and the falling of the scaffold was caused by the unsoundness of one of the ledgers or horizontal poles employed in its construction.

Upon somewhat similar principles, it was held, in a case (t) in which the declaration disclosed nothing more than that the plaintiff had embarked as a seaman on the defendant's vessel, and that the vessel was not seaworthy but leaky, in consequence of which the plaintiff became wet and ill; that this disclosed no contract or legal duty of which there had been a breach, the subject of an action. Lord Campbell, C.J., said: "For aught that appears on this count, the defendant may have been perfectly ignorant of the defects in the vessel, whilst the plaintiff may have examined the vessel before he engaged himself, and have known her state well. Or it may be that both parties were aware of it, and that it was their intention that the seaman should work and fare the harder and have that considered in his wages. There being no allegation of a *scienter*, if we held the defendant liable on this count, we must hold a shipowner always liable to an action from every seaman, if from any accident, a butt having

(r) 5 Ex. 354. In *Seymour v. Maddox*, 16 Q. B. 326, it was held on the facts as stated in the declaration, that the manager of a theatre was not liable to an action at the suit of a singer for injuries sustained by him in falling through a hole in the stage. The case has been questioned in America: *Ryan v. Fowler*, 24 New York, 410, where a factory girl, who had been injured by the fall of a privy, recovered against her master.

(s) This action was also brought under the statute 9 & 10 Vict. c. 93.

(t) *Couch v. Steel*, 3 E. & B. 402. By section 458 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, there shall be implied an obligation on the owner of the ship to use all reasonable means to ensure the seaworthiness of the ship when the voyage commences, and to keep her in a seaworthy condition during the voyage. Section 457 also makes it a misdemeanour to send a ship to sea in an unseaworthy condition. The master's neglect to ship the stanchions and rails provided for the bulwarks by the owners does not render the ship "unseaworthy" within the Act: *Hedley v. Pinkney Steamship Co.*, [1894] A. C. 222. As to the right of an employer to rely on the doctrine of common employment in the case of a breach of a statutory duty, see *Groves v. Lord Wimborne*, [1898] 2 Q. B. 402, *post*, p. 164.

started, or the like, the ship was not seaworthy. No such action has ever been brought; this is a case of the first impression, in support of which neither a decision nor even a *dictum* has been brought to our notice, nor has any legal principle been urged in its support." And he afterwards added: "that *Priestley v. Fowler* (u) seemed to be in principle the same case as this," and to establish that there is no implied contract with the seamen that the vessel is seaworthy. And Coleridge, J., said: "This is in truth a contract between master and servant, and is to be decided on the principles applicable to that relation."

The principle established in *Priestley v. Fowler* has been held by the House of Lords to apply to a case where the accident happened while the workman who suffered injury was returning home in a train supplied gratuitously by the employers for that purpose, but which the workmen might use or not as they pleased. Impliedly the deceased took the risk of accident when travelling in the train, and it was immaterial that the hours of work were over when the accident occurred (x).

In order to make out a defence based on the doctrine of common employment, the person who is sought to be made liable for injuries caused by the negligence of his servant must show not only that the injured man and the man doing the injury were engaged in a common undertaking, but also that they were engaged in the service of a common master. This was definitely decided by the House of Lords (y) in a case in which the defendants contracted to put in fireproof floors in a building which was being erected by another firm of building contractors. A servant of the building contractors who was at work on the building was injured by a servant of the defendants negligently dropping a bucket on to him, and in an action in respect of these injuries it was held that the defendants could not rely on the defence of common employment, because the relation of master and servant did not exist between them and the plaintiff. The difficulties that generally arise here are in showing that the plaintiff was in the service of the defendant (z). Such a service need not be for any defined term, or at fixed wages. A person who is not under any paid contract of service may nevertheless put himself under the control of an employer to act in the capacity of a servant so as to be regarded as such. This is the position of one who, as a mere volunteer, helps the servants of the defendant in their work, even though he do so without the consent or even the knowledge of the

(u) 3 M. & W. 1, *ante*, p. 144.

(x) *Coldrick v. Partridge, Jones & Co., Ltd.*, [1910] A. C. 77.

(y) *Johnson v. Lindsay & Co.*, [1891] A. C. 371; commenting on *Wiggett v. Fox*, 11 Ex. 832, and disapproving of *Woodhead v. Gartness Mineral Co.*, 4 Rettie, 469.

(z) *Cameron v. Nystrom*, [1893] A. C. 308; *Swainson v. North Eastern Railway Co.*, 3 Ex. D. 341; *Abraham v. Reynolds*, 5 H. & N. 143; *Turner v. Great Eastern Railway Co.*, 33 L. T. Rep. 431.

defendant. Such an one, if injured by the negligence of a servant of the defendant, is in no better position than those with whom he has associated himself in respect of their master's liability (a). But a person who, having an interest in what the servants are doing, goes not only to help them but also to attend to a matter in which he as well as the defendant is interested, is not in the position of a mere volunteer, and so has not bound himself to undertake the risks of the employment; as (b) where the owner of a heifer being conveyed on the defendants' railway assisted their servants, with the consent of the station-master, in shunting the horse-box containing his heifer, and was injured in so doing by the negligence of the defendants' servants. So also it was held that the doctrine of common employment was not applicable where the plaintiff assisted the defendant's servant for the benefit of his own employers in order to expedite the work and not voluntarily for the benefit of the defendants (c). It is a rule recognised by a series of decisions (d) that a servant of A. may for a time, or on a particular occasion, or for a particular purpose, be the servant of B., notwithstanding that he continues in A.'s service, and is paid by A. The question whether, for the purpose of carrying out a particular operation, the servant is the servant of A. or of B. depends upon the question under whose orders and control he was for the purposes of that operation; and the question is one of fact to be determined on the circumstances of each particular case. Ship-owners, in contracting with stevedores for the discharge of a ship, agreed to provide a winchman at each hatch. By the negligence of a winchman, who was a member of the crew, a labourer in the employ of the stevedores was injured. It was held that there was no evidence before the jury sufficient to displace the inference to be drawn from the terms of the contract that the shipowners retained their control over the winchman. The winchman was therefore not in the employ of the stevedores, and the shipowners were responsible for his negligence (e).

In the following case (f) the general master was held not liable for the negligence of a servant whom he had lent to another person for a particular purpose. The defendants lent a crane and a man to work it to a firm of wharfingers to use in loading a ship at a wharf, and by the negligence of the man working the crane a servant of the wharfingers was injured. The man working the crane received

(a) *Degg v. Midland Railway Co.*, 1 H. & N. 773, approved by the Exchequer Chamber in *Potter v. Faulkner*, 1 B. & S. 800. The doctrine applies, although the volunteer is an infant: *Bass v. Hendon U. D. Co.*, 28 T. L. R. 317.

(b) *Wright v. London and North Western Railway Co.*, 1 Q. B. D. 252; applying *Holmes v. North Eastern Railway Co.*, L. R. 4 Ex. 254; followed in *Hayward v. Drury Lane Theatre, Ltd.*, and *Moss' Empires, Ltd.*, [1917] 2 K. B. 899.

(c) *Williams v. Linotype and Machinery, Ltd.*, 84 L. J. K. B. 1620.

(d) See also the cases cited *post*, p. 233.

(e) *Union Steamship Co. v. Claridge*, [1894] A. C. 185.

(f) *Donovan v. Laing, Wharton, &c., Syndicate*, [1893] 1 Q. B. 629.

directions as to working it from the wharfingers or their servants, and the defendants had no control in the matter. It was held that the defendants had parted with the power of controlling their servant with regard to the matter on which he was engaged, and therefore they were not responsible for his negligence while so employed. As the question of responsibility depends on the power of control, it is not material whether the general master lends his servant to another in consideration of some reward or not.

The law as to common employment was very fully discussed by the House of Lords, in the following case (*g*):—The appellants were the owners of a coalpit, Reid and M'Guire were miners in their service. According to the usual course of working the pit, the miners were let down into and drawn up from the pit in a cage, which was attached to a rope running over a pulley at a considerable height above the mouth of the pit, and worked by a stationary steam-engine. An engineman was employed by the appellants to attend to this engine, and to the drawing up and letting down of the cage. On an occasion when the cage was coming up with the two workmen, Reid and M'Guire, in it, the engineman negligently omitted to take the proper means for stopping it at the mouth of the pit, and allowed it to be carried with great force to the top of the machinery, in consequence of which it was upset, and the men thrown out and killed. It was held by the House of Lords, after a long and elaborate discussion and consideration of all the English and Scotch cases, that the representatives of neither of them could maintain any action against the owners of the coalpit; and that there was no difference, in this respect, between the law of England and Scotland. There appeared to be no doubt but that S. and the miners were engaged in a common work.

Considerable difficulty, however, may arise in deciding in particular cases what constitutes servants of the same master fellow-workmen or *collaborateurs*, as they are sometimes called, within the meaning of the rule laid down in *Priestley v. Fowler*, and the cases which have followed it. The cases already cited as instances of the application of the rule afford great assistance in determining this question, and further aid may be derived from the following *dicta* of judges on the subject:—

"It is not necessary for this purpose," said Lord Cranworth, in *Bartonshill Coal Company v. Reid* (*h*), "that the workman causing and the workman sustaining the injury should both be engaged in performing the same or similar acts. The driver and the guard of a

(*g*) *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Same Company v. M'Guire*, 3 Macq. 300. The judgment of Lord Cranworth, L.C., in *Reid's Case*, deserves an attentive perusal; he was two years deliberating over it; not that he had any doubt about the non-liability of the master, but from other causes.

(*h*) 3 Macq., at p. 295. See also the definition given by Brett, L.J., in *Charles v. Taylor*, 3 C. P. D. 492, and the cases cited in *The Petrel*, [1893] P. 320.

stage-coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge and those who hammer it into shape, the engineman who conducts a train and the man who regulates the switches or the signals, are all engaged in common work. And so in this case, the man who lets the miners down into the mine, in order that they may work the coal, and afterwards brings them up, together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common employer in bringing the coal to the surface."

And Lord Chelmsford, in *M'Guire's Case* (i), said, "It is necessary in each particular case to ascertain whether the servants are fellow-labourers in the same work; because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him. There may be some nicety and difficulty in particular cases in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at."

This *dictum* of Lord Chelmsford agrees with what was said by the Lord Ordinary in *M'Naughton v. Caledonian Railway Company* (k). "It may be," said he, "that the two persons, viz., the wrongdoer and the injured, though both at the time servants of one master, are engaged in different operations and in distinct departments of work. A dairymaid is bringing home milk from the farm, and is carelessly driven over by the coachman. A painter or slater is engaged at his work on the top of a high ladder placed against the side of a country-house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it. A clerk in a shipping company's office is sent on board a ship belonging to the company with a message to the captain, and he meets with injury by falling through a hatchway which the mate has carelessly left unfastened, though apparently closed. A ploughman is at work on a piece of ground held by a railway company, and adjacent to a railway, and is while in the employment of the company killed by an engine, which, through the rashness or carelessness of the engine-driver, leaps from

(i) *Bartonshill Coal Co. v. M'Guire*, 3 Macq. 307.

(k) 19 Ct. Sess. Cas., 2nd series, 271; 21 *Ibid.* 160.

the line of rails into the field." In such and similar cases it could hardly be contended that the rule laid down in *Priestley v. Fowler* would apply.

Numerous other cases of a similar nature have occurred which it seems sufficient to refer to shortly. Thus the captain of a ship and the crew (*l*): the guard of a railway train and a ganger of plate-layers (*m*): a labourer employed in loading trucks and a deputy foreman or platelayer (*n*): one of a gang of scaffolders and the foreman of the gang (*o*): a carpenter and joiner employed in painting an engine shed near a turntable, and the company's servants engaged in managing traffic, who negligently turned a carriage on the turntable and upset a ladder whereby the painter was thrown down and injured (*p*): a miner and an underlooker whose duty it was to superintend the mining operations (*q*): a workman employed by an engine-maker, and the foreman who ordered him to get on a travelling crane moving on a tramway, which fell and injured the workman (*r*): a manager of barges and a man employed lowering sacks (*s*): a general traffic manager and a milesman (*t*), have been held to be fellow-servants within the rule laid down in *Priestley v. Fowler*. But a compulsory pilot is not a fellow-servant of the crew (*u*): nor are an engine-driver and a signalman on joint staff of two railways with one station (*x*): nor are the crew of a tug and the crew of the tow (*y*): nor the crews of two ships colliding with each other, though belonging to the same owner (*z*).

At one time, and more especially in the Courts of Scotland (*a*), there was some doubt whether a person whose duty it was to superintend his employer's business should not be considered to stand in the position of a deputy-master or vice-principal, rather than that of a fellow-servant with those persons who were employed by his master in subordinate positions, so that the common master might be held

(*l*) *Hedley v. Pinkney & Sons Steamship Co.*, [1894] A. C. 222.

(*m*) *Waller v. South Eastern Railway Co.*, 2 H. & C. 102.

(*n*) *Lovegrove v. London, Brighton, and South Coast Railway Co.*, 16 C. B. (N. S.) 669.

(*o*) *Gallagher v. Piper*, *Ibid.*

(*p*) *Morgan v. Vale of Neath Railway Co.*, L. R. 1 Q. B. 149; see *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Tunney v. Midland Railway Co.*, L. R. 1 C. P. 291; *Coldrick v. Partridge, Jones & Co., Ltd.*, [1910] A. C. 77.

(*q*) *Hall v. Johnson*, 3 H. & C. 589.

(*r*) *Feltham v. England*, L. R. 2 Q. B. 33.

(*s*) *Lovell v. Howell*, 1 C. P. D. 161.

(*t*) *Conway v. Belfast and Northern Counties Railway Co.*, Ir. Rep. 11 C. L. 345; see also *Skerritt v. Scallan*, Ir. Rep. 11 C. L. 389; *McCarthy v. British Shipowners' Co.*, 10 L. R. Ir. 384.

(*u*) *Smith v. Steele*, L. R. 10 Q. B. 125.

(*x*) *Swainson v. North Eastern Railway Co.*, 3 Ex. D. 341. See *Charles v. Taylor*, 3 C. P. D. 492.

(*y*) *Bland v. Ross*, 14 Moo. P. C. 210; approved in *Spaight v. Tedcastle*, 6 App. Cas. 217.

(*z*) *The Petrel*, [1893] P. 320.

(*a*) See *Somerville v. Gray*, 1 Ct. Sess. Cas., 3rd Series, 772; *Hardie v. Addie*, 20 Ct. Sess. Cas., 2nd Series, 553, and 21 Ct. Sess. Cas., 2nd Series, 1382, note.

liable for his deputy's negligence when injury was thereby caused to other persons in the master's service. But in 1868 the doctrine of liability for vice-principals was finally exploded (b), and a manager or foreman must now be considered to be as much a servant as those whose work he superintends.

In one case (c) since that decision of the House of Lords it appears that an attempt was made to argue that a corporation, who can only act through a manager, is in a somewhat different position in this respect from a master who is an individual person: but on the remark of Blackburn, J., that that could not make any difference, the argument was dropped. And in an action by the administratrix of a seaman washed overboard and drowned through the negligence of the captain of a merchant ship, the House of Lords held that the captain, though a representative of a limited company, was a fellow-servant with the deceased (d).

The doctrine of common employment is not excluded by the fact that the workman is an infant (e), although where a master employs boys and girls, or inexperienced workmen or apprentices, and directs them to act under the superintendence and to obey the orders of a deputy, whom he puts in his place, the view has been expressed that it may be they are not, within the meaning of the rule, employed in a common work with the superintendent. "They are acting in obedience to the express commands of their employer, and if he, by the carelessness of his deputy, exposes them to improper risks, it may be that he is liable for the consequences" (f). A girl, only nine days in defendant's employ in a clay mill, was unaware of the risks from machinery. A., acting under the defendant as manager of the works, put her to remove some waste clay while the rollers were in motion. A. ought to have done this himself; and it ought not to have been done at all till the movement of the rollers was suspended. The little girl, in attempting to remove the waste clay in obedience to A.'s order, sustained a severe injury from the rollers; for which she brought an action against the master, and he was held liable (g). It has since

(b) *Wilson v. Merry*, L. R. 1 H. L. Sc. 326. In the United States the law on this point seems to be different. There a vice-principal is not a fellow-servant: *Northern Pacific Railroad Co. v. Peterson*, 162 U. S. 346, and compare *Oakes v. Mase*, 165 U. S. 363, where it was held that the conductor of a train was not a vice-principal, but was a fellow-servant with the engineer operating the locomotive of another train on the same road.

(c) *Howells v. Landore Siemens Steel Co.*, L. R. 10 Q. B. 62.

(d) *Hedley v. Pinkney & Sons' Steamship Co.*, [1894] A. C. 222. So, too, in *Allen v. New Gas Co.*, 1 Ex. D. 251, where a servant of a gas company sued them for damages for injuries suffered by him in his employment, the Court said that assuming the negligence of Farren (the company's manager), his negligence would be that of a fellow-servant, for which the defendants would not be liable.

(e) *Cribb v. Kynoch, Ltd.*, [1907] 2 K. B. 548; approved in *Young v. Hoffman Manufacturing Co., Ltd.*, [1907] 2 K. B. 646.

(f) *Bartonshill Coal Co. v. Reid*, 3 Macq. 266, per Lord Cranworth at p. 295; *M'Millan v. M'Millan*, 23 Ct. Sess. Cas., 2nd series, 1082.

(g) *O'Byrne v. Burn*, 16 Ct. Sess. Cas., 2nd series, 1025

been pointed out, however, that Lord Cranworth's *dictum* was only "a possible explanation of the case of *O'Byrne v. Burn*, distinguishing it from the case before their Lordships" (h), and that *O'Byrne v. Burn* "was decided in 1854, and at that time the different positions of the plaintiff and the negligent fellow-servant, who seems to have been considered as a deputy of the master, may have affected the decision" (i). In *Young v. Hoffman Manufacturing Co., Ltd.* (k), the plaintiff, a boy of fifteen, suffered serious injury when at work with a circular saw. The jury found negligence in the employers "in not instructing him sufficiently in the working of the machine" through their foreman. The Court of Appeal held that "if it is established that a competent foreman was employed by the defendants, whose duty it was . . . to give proper instruction, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instruction," and that no distinction can be drawn in the application of this rule to the case of an adult workman and an infant workman, although "the method and extent of the instruction required may vary according to the age and known disabilities of a workman" (l).

"Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence and the creation or enhancement of danger thereby engendered" (m). For his own personal negligence a master is always liable to his workmen (n). Hence a master working with his servant and by his negligence causing injury to the servant is liable therefor. He could hardly contend that he was in the service of a common master with his own servant, and for the purposes of the rule now being considered he cannot be said to be in a common employment with him (o). Similarly, when one of several partners who are masters of the injured servant works as a fellow-servant with the latter, the partners are jointly responsible. As was pointed out by Crompton, J., in a case (p) where two men were lessees of a coal pit, one of them who acted as banksman being guilty of negligence whereby the plaintiff, a pitman, was injured, and both lessees were held liable for the injury: "The relation of master and servant does not the less subsist because by some arrangement between the joint masters one of them takes upon himself the functions of a workman.

(h) *Cribb v. Kynoch, Ltd.*, [1907] 2 K. B. 548, at p. 555.

(i) *Young v. Hoffman Manufacturing Co., Ltd.*, [1907] 2 K. B. 646, per Sir Gorell Barnes, P., at p. 655.

(k) [1907] 2 K. B. 646. See also *Cribb v. Kynoch, Ltd.*, [1907] 2 K. B. 548, which was approved.

(l) *Ibid.*, per Cozens-Hardy, M.R., at pp. 650, 651.

(m) *Smith v. Baker & Sons*, [1891] A. C. 325, per Lord Herschell at p. 362.

(n) *Thomas v. Quartermaine*, 18 Q. B. D. 685, per Bowen, L.J.

(o) *Ashworth v. Stanwix*, 3 E. & E. 701; *Mellors v. Shaw*, 1 B. & S. 437.

(p) *Ashworth v. Stanwix*, 30 L. J. Q. B. 183; see also *Mellors v. Shaw*, 30 L. J. Q. B. 333; *Moreton v. Hardern*, 4 B. & C. 223.

It is a fallacy to suppose that on that account the character of master is converted into that of a fellow-labourer. Though engaged with the plaintiff in a common employment, W. did not the less remain the master of the plaintiff and the partner of the defendant S. This being so, it follows that S. must be liable in respect of the negligence through which injury has arisen to the plaintiff, as the relation of partners subsisted between W. and S.; and as the negligence was in a matter within the scope of a common undertaking, we think that S. is equally liable with W." Nor would the right of action by a servant against his master for his master's negligence be taken away by the fact that with the negligence of the master there was coupled the fact of negligence on the part of a fellow-servant of the plaintiff (q).

And whilst a servant contracts with his master to bear the risks of the negligence of his fellow-servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. It would be most unreasonable to hold that he is exempt from liability for his servant's negligence in any case where he is not under this obligation. The obligation and the exemption are correlative, and are implied from the relation of master and servant created between the parties (r). And Lord Cairns (s), after saying that a master is not and cannot be liable to his servant "unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do," referred with approval to the judgment of Jervis, C.J., in *Tarrant v. Webb* (t), that "negligence cannot exist if the master does his best to employ competent persons: he cannot warrant the competency of his servants."

Where dangerous machinery has to be used, it is the duty of the employer to take steps to instruct his employees as to its use. There is no obligation upon the employer to give such instruction himself: he may delegate that duty to another employee. And provided he has taken reasonable care to select persons competent to give the necessary instruction, he will not be responsible for any negligence in such instructors arising, for example, from failing fully to instruct or properly to caution workmen employed in dangerous machinery (u).

While "it is not true, as a general proposition of law, that all negligence is evidence of incompetence," negligence on the part of a

(q) *Grand Trunk Railway v. Cummings*, 106 U. S. 700; *Roberts v. Smith*, 2 H. & N. 213.

(r) *Johnson v. Lindsay & Co.*, [1891] A. C. 371, per Lord Herschell at p. 378.

(s) *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

(t) *Tarrant v. Webb*, 18 C. B. 797; *M'Kinney v. Irish North Western Railway Co.*, Ir. R. 2 C. L. 600. According to *Skipp v. Eastern Counties Railway Co.*, 9 Ex. 223, the master is the proper judge of the number of servants requisite for any particular work; it is not a proper question for a jury.

(u) *Young v. Hoffman Manufacturing Co., Ltd.*, [1907] 2 K. B. 646; *Cribb v. Kynoch, Ltd.*, [1907] 2 K. B. 548.

fellow-servant may in some circumstances be evidence of his incompetence (x).

The master is also under the duty of seeing that the condition of the works where he employs his servants is reasonably suitable and safe for the purpose for which the works are used.

So, a mine-owner was held liable where a workman was killed by the fall of a large stone while he was at work underground, if in the opinion of the jury his death was occasioned by the unsafe state of the roof of the mine and the negligence or unskilfulness of the owner in having so left it when the workmen were sent to work there. But he would not have been held liable if the condition of the mine was known to the workman, so that his death, which arose from working under it, was the consequence of his own rashness, and not of any neglect of the owner (y).

So, where miners employed at piecework in working coal while in the pit, into which they had been let down in the usual manner, remonstrated with the underground agent as to the state of the mine, complaining, among other things, that air was not adequately admitted, and also that their wages were not sufficient, and on his refusing redress they declined to work any longer, and desired to be drawn up again. The agent acceded to this, and one of the men in the course of the ascent was thrown over and killed. The jury found that the death arose from the pit not being in a safe and sufficient state. It was held by the House of Lords that the men had a right to leave their work if they thought fit, and that their employers were bound to take all reasonable measures for the purpose of having the shaft in a proper condition, so that the men might be brought up safely, and not having done so were liable for the consequences (z). If premises were originally badly constructed and the servant was injured by reason of such bad construction, the employer would not be liable to the workman, unless personal negligence be proved against him or some person acting by his orders for whom he is responsible (a).

“When a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks” (b). It is no evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use. Where, therefore, a sugar-

(x) *McCarthy v. British Shipowners' Co.*, 10 L. R. Ir. 384, per Dowse, B., at p. 392; *Skerritt v. Scallan*, Ir. Rep. 11 C. L. 389.

(y) *Paterson v. Wallace*, 1 Macq. 748.

(z) *Brydon v. Stewart*, 2 Macq. 30.

(a) *Brown v. Accrington Cotton Spinning Co.*, 3 H. & C. 511; *Potts v. Port Carlisle Dock and Railway Co.*, 8 W. R. 524.

(b) *Bartonshill Coal Co. v. Reid*, 3 Macq. 266, per Lord Cranworth at p. 288; *Searle v. Lindsay*, 11 C. B. (N. S.) 429. Duties of this nature are also imposed sometimes by statute, as in sects. 10 to 18 of the Factory and Workshop Act, 1901.

refiner's labourer was killed through the fall of sugar moulds which he was raising by machinery to which he attached it by means of a clip which slipped off, it was held that his administratrix could not maintain an action, under Lord Campbell's Act, against his master, although it appeared that another and safer mode of raising the moulds was usual, and had been left off by the defendant (c). And, where a workman was killed by the falling of a block from a travelling crane owing to overwinding, and evidence was called to show that there were safety devices to prevent danger from overwinding, it was pointed out in the judgment given when the case came before the Privy Council that "a master is not bound at once to adopt all the latest improvements and appliances. It is a question of fact in each case, was it in the circumstances a want of reasonable care not to have adopted them?" (d). As was pointed out by Lord Watson in *Smith v. Baker & Sons* (e): "There are many kinds of work in which danger is necessarily inherent, where precautions such as would ensure safety to the workman are either impossible, or would only be obtainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and in the absence of express stipulation to the contrary, the risk is held to be with him and not with the employer. On the other hand, there are cases in which the work is not intrinsically dangerous, but is rendered dangerous by some defect which it was the duty of the master to remedy." And in the same case Lord Herschell said (f): "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

Again, at common law an employer is under a duty not to make use of a negligent system, or a negligent mode of using perfectly sound machinery. A workman employed in a stone quarry was injured in blasting because, owing to a defective system, he could not get out of the way quickly enough to avoid injuries when an explosion took place. It was held (g) that he was entitled to recover damages against his master.

And it may be the master's duty from time to time to inspect his machinery. If it were the custom of a trade to test at intervals the appliances used in it, it might be negligence on the part of a master

(c) *Dynen v. Leach*, 26 L. J. Ex. 221. See the judgment of Bramwell, B.

(d) *Toronto Power Co., Ltd. v. Paskwan*, [1915] A. C. 734, 738.

(e) [1891] A. C. 325 at p. 362; and see *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338, per A. L. Smith, L.J., at p. 342.

(f) [1891] A. C. 325 at p. 356. See also *Toronto Power Co., Ltd. v. Paskwan*, [1915] A. C. 734.

(g) *Sword v. Cameron*, 1 Ct. Sess. Cas., 2nd series, 493; *Bartonshill Coal Co. v. M'Guire*, 3 Macq. 300; *Smith v. Baker & Sons*, [1891] A. C. 325.

to omit to do that which was customary and considered the reasonable thing to do. A stevedore was injured through the breaking, from wear and tear and bad welding, of a chain attached to a donkey engine used in loading the defendant's ship. A person accustomed to handle chains could on a slight examination have discovered that the chain was unfit for the use to which it was put, and the defendant, who had not taken proper steps to have the chain examined and tested, was held liable (*h*).

On the other hand, there may be circumstances where a servant cannot recover for injuries resulting from defects in the plant and machinery connected with his work. The plaintiff was a labourer employed by the defendant in the building of a house in a street at Liverpool. A hoarding had been put up to protect the building from persons and carriages passing. The plaintiff had complained that the hoarding was too narrow, and he had not room to pass with a hod of mortar between it and a crab and cradle that had been erected there. While he was working a vehicle was coming up the street where there was plenty of room and struck the hoarding, in consequence of which he got injured. He then brought an action against his employer, but was nonsuited, as after he had complained he had continued working there voluntarily with full knowledge, and the part which the master had in the injury was too remote. As Martin B., pointed out: "It did not appear that the negligent placing of the hoarding caused it to fall; on the contrary, it was expressly shown that the cart knocked it down" (*i*).

If a master order a servant to use machinery, tackle or implements, which he (the master) knows, and the servant does not know, to be unsound or unsafe, in that case the master would be liable to indemnify the servant from the consequence of using such insecure apparatus. Thus, where a declaration alleged that the defendant was possessed of a ladder unsafe and unfit for use by any person carrying corn up the same, and the plaintiff was the defendant's servant, yet the defendant, well knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder, and the plaintiff, in obedience to the order, and believing the ladder to be proper, and not knowing the contrary, did carry corn up for the defendant, but, by reason of its being unsafe and unfit, fell from it and was injured; it was held, on demurrer, to be sufficient, without an averment that the plaintiff had no notice that the ladder was unsafe (*k*).

So, where the declaration alleged that the defendants, well knowing that certain carcasses were diseased and infectious, employed the plaintiff, who was ignorant of that fact, to cut them up, whereby the

(*h*) *Murphy v. Phillips*, 35 L. T. 477; and see *Hanrahan v. Ardnamult Steamship Co.*, 22 L. R. Ir. 55.

(*i*) *Assop v. Yates*, 2 H. & N. 768.

(*k*) *Williams v. Clough*, 3 H. & N. 258; and see *Potts v. Plunkett*, 9 Ir. C. L. R. 290.

plaintiff was injured, it was held to disclose a good cause of action (l).

In an action for injuries to a servant caused by a machine alleged to be constructed unsafely and in a defective and improper manner, the declaration contained an averment that the injury was caused by reason of the negligence and default of the defendants. It was held (m), that, though it would have been more expedient had the declaration contained a definite averment of the deceased's ignorance, yet the declaration was sufficient without the deceased's ignorance being alleged in express terms.

Where the injury to the plaintiff was caused by the fall of the iron door of his employer's warehouse, the Court of Appeal held that the statement of claim must allege both the knowledge of the master and the ignorance of the servant (n). But where a workman was employed on an elevated tramway and his employers provided no ladder or other safe means of ascending to or descending from it, and the servant in descending from it slipped and was killed by his fall, it was held (o) that the plaintiff was entitled to judgment on the findings of the jury that the defendants had not exercised due care to have the tramway in a safe and proper condition so as to protect their servants from unnecessary risks, that it was dangerous to descend from the tramway without a ladder, and that the deceased knew that it was dangerous. As was pointed out by A. L. Smith, L.J.: "This is not the case where a master has provided proper appliances and done his best to maintain them in a state of efficiency, in which case the man has no action against his master if the appliances become unsafe whereby the man has been injured, unless he avers and proves that the master knew of their having become unsafe, and that the man was ignorant of it. . . . This is the case of no proper appliances having been supplied by the master at all, so that the man might carry on his operation in such a way as not to be exposed to unnecessary risk."

It was also held that *Griffiths v. London and St. Katherine's Dock Co.*, *supra*, did not apply in a case (p) where the cause of action rested on personal negligence in the employers, namely, their want of supervision, the facts being that on a ship in process of loading, a rope ladder, which was unsafe, had been supplied in place of the perfectly safe iron ladder, and that, in using the rope ladder, the plaintiff was injured. In holding the workman's employers, a firm of stevedores, liable, Lord Sterndale, M.R., said: "It seems to me that when once it was ascertained that the original safe mode of access had gone, that

(l) *Davies v. England*, 33 L. J. Q. B. 321. See also *Smyly v. Glasgow and Londonderry Steam Packet Co.*, Ir. R. 2 C. L. 24.

(m) *Watling v. Oastler*, L. R. 6 Ex. 73.

(n) *Griffiths v. London and St. Katherine's Dock Co.*, 13 Q. B. D. 259.

(o) *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338.

(p) *Monaghan v. W. H. Rhodes & Son*, [1920] 1 K. B. 487.

another one of obvious danger had been substituted, and that the defendants had seen that obviously dangerous substitute and did not interfere, it follows that the defendants were negligent." And Atkin, L.J., pointed out that since there was no sufficient evidence that the workman accepted the risk involved in the use of the dangerous ladder, his knowledge of the risk was immaterial.

In recent years there has been much discussion of the question of the effect of a servant's continuing to work with knowledge of a defect in the machinery or appliances of his master upon his right to recover in an action against his master for injuries caused by that defect. The maxim "*Volenti non fit injuria*," says Lord Herschell (q), "is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. The maxim has no special application to the case of employer and employed, though its application may well be invoked in such a case." The decision of the House of Lords in that case shows that the question whether the servant has so undertaken a risk as to bring himself within the maxim is one of fact and not of law, and this is so both at common law and in cases arising under the Employers' Liability Act, 1880. In order that a man may be *volens*, it is necessary that he should thoroughly understand the nature of the risk he is going to run; but the mere fact that a man knew of a danger and yet incurred it, is not conclusive that he incurred it willingly within the meaning of the maxim (r). Lindley, L.J., puts the case of a workman "who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it," and he says that in his opinion such a man "cannot be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it" (s). But Lord Herschell goes farther (t), and says that where a servant has been subjected to risks owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty by reason of the doctrine "*Volenti non fit injuria*." The defence arising from this maxim is not applicable to cases where the injury arises from the breach of a statutory duty on the part of the employer (u).

Contributory negligence by the servant is a defence to an action by him for injury suffered through the negligence of his master, and

(q) *Smith v. Baker & Sons*, [1891] A. C. 325, 360.

(r) *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Yarmouth v. France*, 19 Q. B. D. 647; see also *Osborne v. London and North Western Railway Co.*, 21 Q. B. D. 220; *Membery v. Great Western Railway Co.*, 14 App. Cas. 179.

(s) *Yarmouth v. France*, 19 Q. B. D. 647, 661.

(t) *Smith v. Baker*, [1891] A. C. 325, 362. See *Thrussell v. Handyside & Co.*, 20 Q. B. D. 359, and *Skipp v. Eastern Counties Railway Co.*, 9 Ex. 223.

(u) *Baddeley v. Earl Granville*, 19 Q. B. D. 423; *Davies v. Thomas Owen & Co., Ltd.*, [1919] 2 K. B. 39. See p. 162, *post*.

this is so in the case of an action under the Employers' Liability Act, 1880, as well as at common law (x). It is the duty of the servant to exercise reasonable care in doing his work, and failure to exercise such care will be negligence on his part. "The received and usual way of directing a jury as to this, is to say that if the plaintiff could by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendants' negligence, he cannot recover" (y). But though the plaintiff may have been guilty of contributory negligence, it is a well established rule that if the defendant could, in the result by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him (z).

Where the Legislature has by statute imposed upon the master a duty for the protection of the servant, the servant may, *primâ facie* (a), maintain an action against his master for any breach of statutory regulations, whereby he has sustained particular injury. Of this nature are actions against employers under the Factory Acts for not properly fencing machinery, whereby workpeople get injured (b). So, where the plaintiff was injured at his work by a machine which was not securely fenced, and the failure to fence was a contravention of the Factory and Workshop Act, 1901, s. 10 (1), which imposed an obligation to fence securely, which was absolute, it was held that the injured workman could recover in an action for breach of statutory duty, notwithstanding that the jury found that to fence securely the machinery in

(x) *Weblin v. Ballard*, 17 Q. B. D. 122. Contributory negligence is not a defence to a claim under the Workmen's Compensation Act, 1906, except so far as the injury is attributable to the workman's serious and wilful misconduct: see sect. 1, subsect. 2 (c).

(y) *Dublin, Wicklow and Wexford Railway Co. v. Slattery*, 3 App. Cas. 1155, per Lord Blackburn at p. 1207. The meaning of contributory negligence and the question of the onus of proof was much discussed in *Davey v. London and South Western Railway Co.*, 12 Q. B. D. 70; *Wakelin v. London and South Western Railway Co.*, 12 App. Cas. 41; and in *Smith v. South Eastern Railway Co.*, [1896] 1 Q. B. 178.

(z) *Radley v. London and North Western Railway Co.*, 1 App. Cas. 758.

(a) The question whether an action will lie in respect of a breach of a statutory duty for which a remedy other than an action is given by the statute depends upon the intention of the Legislature which is to be gathered from the whole purview of the Act: *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441; *Vallance v. Falle*, 13 Q. B. D. 109. For this purpose it is material to consider whether the Act was passed in the interests of the public at large, or for the benefit of a particular class of persons: *Gorris v. Scott*, L. R. 9 Ex. 125; whether a penalty imposed by the statute for a breach of the duty is to enure to the benefit of the person injured by the breach: *Groves v. Lord Wimborne*, [1898] 2 Q. B. 402; and such matters as the nature of the injuries likely to ensue from a breach, the amount of the penalty imposed, and the kind of person on whom it is imposed. Where a new obligation is created by statute, and a specific remedy is provided by the same statute, that statutory remedy is, as a rule, the only one: *Pasmore v. Oswaldtwistle District Council*, [1898] A. C. 387; but where a common law liability is affirmed by a statute giving a special remedy other than that existing at common law the plaintiff is in general at liberty to choose between the two remedies: *Whittaker v. London County Council*, [1915] 2 K. B. 676.

(b) Such as *Coe v. Platt*, 6 Ex. 752; 7 Ex. 460, 923; *Caswell v. Worth*, 5 E. & B. 849; *Doel v. Sheppard*, 5 E. & B. 856; *Schofield v. Schunck*, 5 E. & B. 858, note; *Clarke v. Holmes*, 7 H. & N. 937; *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130.

question was commercially and mechanically impracticable (c). But even in such cases the master is not liable if the servant by his own negligence or wilful misconduct (*e.g.*, by setting the machinery in motion) cause the accident, or could have avoided the injury by the exercise of ordinary care (d). Upon this ground the defendant was held not liable in the following case (e): Under an Act for the Inspection of Coalmines (f), special rules were framed and duly approved of for the regulation of the defendant's colliery, and by one of these rules it was provided, that every morning, before the miners were let down the shaft into the mine, the cage, by which they were to descend, should be let down and pulled up again, heavily loaded, to test the sufficiency of the rope and of the tackling. But the defendant, who superintended the working of his colliery, instead of enforcing this rule, allowed it to be entirely neglected, and to his knowledge it had been entirely neglected by his workmen for many weeks before the accident happened, which caused the death of the deceased. The night before the accident the rope, by which the cage was suspended, being then in good condition, was injured by an accidental fire in the colliery. Next morning the deceased and other miners were let down the shaft without any testing of the rope and the tackling. If that testing had taken place, the insufficiency of the rope would have been discovered, and the men would all have been saved. But the rope broke, and the deceased, with several others, was killed on the spot. There was most culpable negligence on the part of the defendant in neglecting the rule and in keeping in his employment a banksman whom he knew habitually disregarded it. Looking to these facts only, although the banksman was the fellow-servant of the deceased, and both the deceased and he were employed by the defendant in the colliery as fellow-labourers, Lord Campbell said: "We should have held the defendant liable, his negligence having materially contributed to the death of the deceased. But according to the report of the learned judge who tried the cause, it was further in evidence, that gross negligence was to be imputed to the deceased himself, and that this negligence materially contributed to his death. With the exercise of ordinary prudence he would have escaped the danger, and his life would have been saved. He knew the rule for testing the rope and tackling every morning, and he knew that this rule was habitually violated; further, on the morning of the accident he and the other miners were told by the banksman that they had better examine the rope before they went down. Nevertheless they disregarded this warning; and, immediately getting into the cage, the rope broke as it descended, and they were killed."

(c) *Davies v. Thomas Owen & Co., Ltd.*, [1919] 2 K. B. 39.

(d) *Caswell v. Worth*, 5 E. & B. 849; and see *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130 at p. 139.

(e) *Senior v. Ward*, 1 Ell. & Ell. 385.

(f) 18 & 19 Vict. c. 108. See now the Coal Mines Act, 1911 (1 & 2 Geo. V. c. 50).

And where an action lies for an injury caused by an omission on the part of the defendant to perform an absolute duty cast on him by statute, so that the plaintiff is not under the necessity of proving negligence on the part of any one as part of his cause of action, the defence of common employment is not open to the defendant (*g*). So where the statutory duty (*h*) was imposed on mineowners of taking all reasonable means to prevent any contravention of the rules as to safety, and there had been a breach of this duty inasmuch as the rule requiring a "competent person" to be appointed to inspect the mine had not been observed, the House of Lords held that the statutory duty imposed upon the employers excluded the plea of common employment, and that a common law action would lie notwithstanding that the direct cause of the injury was the negligence of the under-manager and foreman (*i*).

Nor, where the injury sustained is the consequence of a breach of an express statutory duty by the defendant, will the maxim *volenti non fit injuria* afford any defence (*k*). .

A master, moreover, is not liable to a servant for injuries sustained in the discharge of duties for which he was not hired, or in the performance of orders which he was not bound to obey; *e.g.*, a servant is not bound to risk his life or limb in obedience to his master's orders; and if he do so, he (the servant) must take the consequences, his master is not liable for them (*l*).

Whether or not one servant can be liable to another for damages arising from negligence, in the course of their common employment, is a question which has been raised in England only in comparatively recent times. A *dictum* to the contrary has indeed been attributed to Pollock, C.B., in one report of *Southcote v. Stanley* (*m*), but is not to be found in another report of the same case (*n*). In 1881 it was expressly decided in Massachusetts (*o*) that a servant is liable for injury caused by his negligence to his fellow-servant. In that case it appeared that the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up, by direction of the corporation, certain partitions in a room in which the corporation was conducting the business of making wire. The defen-

(*g*) *Groves v. Lord Wimborne*, [1898] 2 Q. B. 402.

(*h*) *I.e.*, under the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49. See now Coal Mines Act, 1911 (1 & 2 Geo. V. c. 50), which repeals most of the Act of 1887.

(*i*) *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A. C. 149. See also *Britannic Merthyr Coal Co. v. David*, [1910] A. C. 74.

(*k*) *Baddeley v. Earl Granville*, 19 Q. B. D. 423; *Davies v. T. Owen & Co., Ltd.*, [1919] 2 K. B. 39.

(*l*) *Ante*, p. 142.

(*m*) 1 H. & N. 247 at p. 250.

(*n*) 25 L. J. Ex. 339. And observe what Alderson, B., is reported to have said on this point in this case.

(*o*) *Osborne v. Morgan*, 130 Mass. 102, overruling the case decided in 1855 of *Albro v. Jaquith*, 4 Gray's Rep. (Mass.) 99.

dants, one, the superintendent, and the others, agents and servants of the corporation, being employed in that business, negligently and without regard to the safety of persons rightfully in the room, placed a tackle, block and chains upon an iron rail suspended from the ceiling of the room, and suffered them to remain there in such a manner, and so unprotected from falling, that by reason thereof they fell upon and injured the plaintiff. Upon these facts it was held that the plaintiff was a fellow-servant of the defendants, and that the action was maintainable against them.

In Scotland, also, a fellow-servant has been held liable in a case where a workman was killed by an explosion of fire-damp in a mine due to the fault of the underground manager. The latter and the coalmaster were sued. It was held that the doctrine of common employment applied so that the master was discharged from liability, but the underground manager was held liable in damages although he was a fellow-servant of the deceased workman (*p*).

Finally it was decided by the House of Lords that the law of England was the same; and Lord Loreburn, L.C., expressly dissented from the *dictum* of Pollock, C.B., in *Southcote v. Stanley*, above referred to and pointed out that it would be disastrous to workmen themselves if the doctrine were accepted that a free hand should be given to everybody "to neglect his duty towards his fellow-servant and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty" (*q*).

In cases where a person has been killed, and under Lord Campbell's Act (the Fatal Accidents Act, 1846) (*r*), his representative would have a right of action, that right of action is so far only a substituted right in the place of that which the deceased would have had if he had survived, that it will be barred if the deceased had accepted a sum from the defendant in full compensation for his injuries (*s*), or if by contract he had bound himself not to claim any compensation (*t*).

Such being the rights and duties existing between master and servant at common law, the Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), was passed. By that Act the defence of common employment was taken away from an employer in the limited number of cases where an action could be brought under the Act (*u*), which, moreover, only applies to a limited class of persons, *i.e.*, to persons coming within the definition of "workman" in sect. 8. By the Workmen's Compensation Act, 1906 (6 *Edw. VII.* c. 58), workmen are given still further rights of claiming compensation from their employers for personal

(*p*) *Wright v. Roxburgh*, 2 Ct. Sess. Cas. (Third Ser.) 748.

(*q*) *Lees v. Dunkerley Bros.*, [1911] A. C. 5.

(*r*) 9 & 10 *Vict.* c. 93, as amended by 27 & 28 *Vict.* c. 95, and 8 *Edw. VII.* c. 7.

(*s*) *Read v. Great Eastern Railway Co.*, L. R. 3 Q. B. 555.

(*t*) *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357.

(*u*) The general effect of the Act was explained in *Thomas v. Quartermaine*, 18 Q. B. D. 685.

injuries suffered by them by accidents arising out of and in the course of their employment. Proof of negligence on the part of the employer is not necessary to support a claim under the Workmen's Compensation Act.

In the event of an accident happening on a ship in harbour it was frequently difficult for the injured person to pursue any remedy by reason of the departure of the vessel and the fact that the owners had no address in the United Kingdom. The Shipowners' Negligence (Remedies) Act, 1905 (x), provides a procedure for detaining a ship when it is alleged that the owners are liable for damages in respect of personal injuries caused by the ship, or sustained on, in or about the ship in any port or harbour in the United Kingdom "in consequence of the wrongful act, neglect, or default of the owners of the ship, or the master or officers or crew thereof, or any other person in the employment of the owners of the ship, or of any defect in the ship or its apparel or equipment," and that none of the owners reside in the United Kingdom.

Statutory Provision for the Welfare of Employed Persons.

Acts of Parliament have been passed at various times for the regulation of the employment of persons in cotton and other factories, and for the preservation of their health, which are commonly called the "The Factory Acts." Beginning with the protection of women and children, they have, by the generality of their provisions, come to include, irrespective of sex or age, all persons employed in the premises included in the statutes.

The provisions contained in the now repealed Acts, which were applicable to young persons (that is, persons above thirteen and under eighteen years of age) (y), were first extended to females above that age in 1844 (z). In 1860, the powers and provisions of the Factory Acts were applied to bleaching works and dyeing works (a): in 1861, to lace factories (b): in 1862, to bleach fields or works in which the operation of bleaching by the open air process is carried on (c): and in 1863, to calendering works and finishing works (d). In 1863 there was also passed the Bakehouse Regulation Act, 1863, which limited the hours of labour of persons under eighteen years of age in bakehouses, and contained regulations as to the cleanliness of bakehouses. In 1867 the application of the Factory Acts was considerably extended,

(x) 5 Edw. VII. c. 10. See Chitty's Statutes, title, "Shipping."

(y) 7 & 8 Vict. c. 15, s. 73.

(z) 7 & 8 Vict. c. 15, s. 32, and see 13 & 14 Vict. c. 54.

(a) By 23 & 24 Vict. c. 78, extended by 27 & 28 Vict. c. 98 [both repealed 33 & 34 Vict. c. 62, s. 5].

(b) By 24 & 25 Vict. c. 117 [repealed 41 & 42 Vict. c. 16, s. 107].

(c) By 25 & 26 Vict. c. 8 [repealed 33 & 34 Vict. c. 62, s. 5].

(d) By 26 & 27 Vict. c. 38 [repealed 33 & 34 Vict. c. 62, s. 5].

and they were applied to blast furnaces, iron and various other foundries, to manufactories of paper, glass and tobacco, as well as to letterpress printing and bookbinding, and in fact to any trade establishment in which fifty or more persons were employed in any manufacturing process; while smaller establishments were placed under the Workshop Regulation Act, 1867. Another advance was made by the Factory and Workshop Act, 1878, which repealed and consolidated sixteen statutes. It was amended in 1883 by an Act dealing chiefly with whitelead factories and bakehouses; in 1889 by an Act applying to cotton cloth factories, and by another Act in 1891, containing various miscellaneous amendments. Next came the Factory and Workshop Act, 1895, which was the first of this series of Acts to deal with laundries. It also applied the provisions of the Act of 1878 to docks, and contained many other important matters. In 1897 another Act was passed which dealt solely with cotton cloth factories.

The most recent of this series of Acts are the Factory and Workshop Acts of 1901 (*e*) and 1907 (*f*). By the 1901 Act the Act of 1878 and its five amending Acts were repealed and consolidated. The Act of 1907 deals with the application of the Factory Act to laundries and institutions carried on for charitable or reformatory purposes. The ventilation and humidity of cotton cloth factories is now controlled by regulations made under the Factory and Workshop (Cotton Cloth Factories) Act, 1911 (1 & 2 *Geo. V. c. 21*).

The health of persons employed in shops has in recent years also been the subject of legislation. The Shop Hours Act, 1892, placed restrictions on the number of hours for which persons under eighteen years of age may be employed in such places. This Act was amended in 1893 and 1895. The Seats for Shop Assistants Act, 1899, directed that seats behind the counter should be provided in shops where female assistants were employed for the retailing of goods to the public. Of the more recent Acts on this subject, the Shop Hours Act, 1904, and the Shops Act, 1911, make provision for the compulsory early closing of shops. All these Acts were repealed when the consolidating measure known as the Shops Act, 1912 (*g*), was passed, and this latter measure was itself amended in 1913 (*h*) in its application to premises used for the sale of refreshments.

The Agricultural Gangs Act, 1867 (*i*), provided regulations to be observed by every gangmaster with respect to the employment of children, young persons and women in the execution of agricultural work.

An entirely new departure in protective legislation of the kind now

(*e*) 1 Edw. VII. c. 22. See Chitty's Statutes, title, "Factories, &c."

(*f*) 7 Edw. VII. c. 39.

(*g*) 2 *Geo. V. c. 3*. See Chitty's Statutes, title, "Shops."

(*h*) Shops Act, 1913 (2 & 3 *Geo. V. c. 24*).

(*i*) 30 & 31 *Vict. c. 130*.

under discussion was taken in 1920, when the British Legislature passed two Acts which were the direct result of the efforts of the International Labour Organization of the League of Nations to co-ordinate labour legislation throughout the world. The Women and Young Persons (Employment in Lead Processes) Act, 1920 (10 & 11 Geo. V. c. 62), makes provision for the better protection of women and young persons against lead poisoning. The Employment of Women, Young Persons and Children Act, 1920 (10 & 11 Geo. V. c. 65), gives effect to an international agreement imposing restrictions as to the employment of women, young persons and children.

2. AS BETWEEN THE SERVANT AND THIRD PERSONS.

From early times an action by a master has lain against a person who has taken or enticed away his servant in breach of the contract of service, and this matter has been already referred to (*k*). But in recent times, as a result of the formation of trade unions and the greater pressure that can be brought to bear upon employers and their workmen by the association of many persons in one common object, the rights of persons suffering from the effects of such associations have been the subject of some important decisions.

One question which seems to be now settled has been the meaning and effect of "malice" where that word has been used in this connection, and the effect of an intention to do harm as constituting part of a cause of action.

The *Mogul Steamship Co. v. Macgregor* (*l*) was not a case of master and servant. It was a case where several shipowners combined together with the view of securing a carrying trade exclusively for themselves, and for this purpose they underbid the plaintiffs, who were rival shipowners, and reduced the freights to a certain port so low as to be unremunerative. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and offered a rebate on freights to all shippers who shipped only with them to the exclusion of the plaintiffs' ships. The plaintiffs brought an action for the damage which they had suffered through this combination, alleging a conspiracy to injure them. The House of Lords held that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. Lord Halsbury at the same time said, however: "Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy

(*k*) See *Lumley v. Gye*, and other cases cited, *ante*, p. 86.

(*l*) *Mogul Steamship Co. v. Macgregor*, [1892] A. C. 25.

and unlawful." In the Court of Appeal, Bowen, L.J., in stating the same rule of law, had cited as instances of such forbidden acts the impeding or threatening servants or workmen.

In *Allen v. Flood* (m), the effect of a malicious intent on the part of a person who does acts which cause injury to another was again discussed, and it was decided that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of it liable to a civil action. These two cases have overruled the *dicta* of Lord Esher, M.R., in *Temperton v. Russell* (n), to the effect that where injury ensues from an act of persuasion whereby a person is induced to break his contract, the matter is actionable, provided only that the act was malicious, in the sense of being done for the express purpose of injuring another person. *Allen v. Flood* was an action brought by a shipwright, employed in the repair of a ship, against an official of a trade union, who had informed the plaintiff's employers that, if they did not discharge the plaintiff, their workmen had determined to leave off work. In consequence of receiving this information the plaintiff's employers discharged him. The House of Lords held that no cause of action was shown. Many points of law were considered in the case, but the actual decision does not seem to be of the importance which at first was attributed to it. In *Quinn v. Leathem* (o), Lord Halsbury said, in reference to *Allen v. Flood*, that he wished to observe that every judgment in it must be read as applicable to the particular facts proved or assumed to be proved, and that the case is only an authority for what it actually decides. He then went on to say that the hypothesis of fact on which the case was decided was that the defendant had not uttered or carried into effect any threat at all, but had merely informed the plaintiff's employers of what their workmen had resolved to do; and a further element in the decision was that there was no case of conspiracy or even combination.

In *Temperton v. Russell* (p), the defendants were members of a committee of three trade unions. Acting with the view of injuring the plaintiff, they informed a person named Brentano that his workmen would leave his employ if he continued dealing with the plaintiff. In consequence of this, Brentano broke off the contracts which in

(m) *Allen v. Flood*, [1898] A. C. 1.

(n) *Temperton v. Russell*, [1893] 1 Q. B. 715.

(o) *Quinn v. Leathem*, [1901] A. C. 495. Proceeding entirely upon the facts in the case, the principle of *Allen v. Flood* was applied in *Davies v. Thomas*, [1920] 2 Ch. 189, Lord Sterndale, M.R., refusing to assent to the proposition that "where you have a number of persons combined, any act done by them in combination to induce one person not to deal with another, or not to employ another, is actionable." See also *Wolstenholme v. Ariss*, [1920] 2 Ch. 403.

(p) [1893] 1 Q. B. 715. The selection of the defendants in this case was remarked upon as peculiar by Lord Macnaghten in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, in which case the House of Lords held that a trade union can be sued for a tort.

the course of his trade he had made with the plaintiff; and for the damage thereby caused to him the plaintiff sued the defendants. The Court of Appeal held that the action was maintainable, and this decision was approved of in *Quinn v. Leathem* (q), though at the same time the House of Lords expressed disapproval of certain *dicta* of Lord Esher, M.R., on the subject of malice. In this case the defendants had intentionally induced Brentano to break his contract with the plaintiff, and having no just cause for so doing, they were liable for the injury which they had thereby done to the plaintiff. In *Quinn v. Leathem* (q) the plaintiff was a butcher, and the defendants were the officials of a trade union. The principal cause of action alleged was that the defendants had combined together with the view of compelling the plaintiff to employ only union men; that for this purpose they had informed a man named Munce that they would instruct his workmen to leave his service if he received any meat from the plaintiff; and that, in consequence of this, Munce had ceased to deal with the plaintiff, whereby the plaintiff had suffered damage. It was also alleged that the defendants had induced a servant of the plaintiff to break his contract of service, but the main point in the case did not involve any alleged breach of contract. The action was brought in Ireland, and at the trial, before Fitzgibbon, J., with a jury, the plaintiff obtained judgment for £200 damages. A new trial motion was dismissed by the majority of the Divisional Court, Palles, C.B., dissenting, and this decision was affirmed by the Court of Appeal and by the House of Lords. The case was not one like the *Mogul Steamship Co. v. Macgregor* (r). In that case no legal right of the plaintiff was interfered with, nor was any coercion used against him, but what was done was done by the defendants with the object of benefiting their own trade. In *Quinn v. Leathem*, Lord Lindley said that the plaintiff was at liberty to earn his own living, and this involved liberty to deal with other persons who were willing to deal with him. This liberty was a right recognised by law, its correlative being the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. And again he said: "The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found."

In *Read v. Friendly Society of Operative Stonemasons* (s) the

(q) [1901] A. C. 495.

(r) [1892] A. C. 25; *ante*, p. 168.

(s) [1902] 2 K. B. 732.

plaintiff, who was not a member of the defendant society, proved that he had been dismissed by his employer in breach of a contract of apprenticeship, that this breach had been intentionally brought about by the officials of the defendant society, and that they had procured their object by means of threats of calling out all the workmen in the employer's service. In answer to this the defendants contended that they had "just cause" for procuring the employer's breach of contract with the plaintiff, alleging that they had acted in good faith, believing that the contract of apprenticeship was a breach of the rules of their society, which rules had been agreed to by the employer. The Court held that the plaintiff was entitled to judgment, since the officials of the society had knowingly induced the commission of an actionable wrong and had employed illegal means to bring it about. Whatever might be the nature of a "just cause," such as would negative the "malice" which is necessary to support an action of this kind, the question of the existence of a "just cause" could not arise where illegal means have been used to bring about a breach of contract detrimental to the plaintiff.

A similar argument was raised in a subsequent case (t) which went to the House of Lords. That was an action by employers against a trade union whose officials had induced the miners in the plaintiffs' employment to commit a breach of their contracts of service. The trade union did not contend that the course they had taken was not *prima facie* an actionable wrong, but they alleged that they were justified in what they had done because they believed that they were acting in the interests both of the men and of the plaintiffs. The House of Lords held that this could be no justification for the defendants' conduct.

It was also held to be an actionable wrong to interfere with any one in the exercise of his right to dispose of his labour according to his will. The plaintiff (u) was a day labourer who had been a member of the defendant society and treasurer of one of its branches. The society had recovered judgment against him in an action for money due to the society from him as treasurer, and in consequence of his not paying the judgment debt he was expelled from the society. After this, in order to compel the plaintiff to pay the money due from him to the society, the general and the local secretaries of the society on several occasions prevented him from obtaining and from retaining employment by threatening to call out union men working with him. The desire of the two officials to compel the plaintiff to pay the judgment debt did not justify their interference with the plaintiff's rights, and on the principle of *Barwick v. English Joint Stock Bank* (x), the society

(t) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239.

(u) *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600.

(x) L. R. 2 Ex. 259.

was liable for the acts of its two servants which were done in the course of their service and for the benefit of the society.

By the Trade Disputes Act, 1906 (6 *Edw. VII. c. 47*), s. 3, it is provided that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills." In *Conway v. Wade* (y), the extent to which pre-existing law was altered by this enactment was considered, and in the words of Lord Loreburn, L.C. (at p. 511): "It is clear that, if there be threats or violence, this section gives no protection, for then there is some other ground of action besides the ground that 'it induces some other person to break a contract' and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done 'in contemplation or furtherance of a trade dispute.' . . . In this respect there is a change. If there be no threat or violence and no breach of contract, and yet there is 'an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills,' there again there is, perhaps, a change. It is not to be actionable provided that it was done 'in contemplation or furtherance of a trade dispute.' So there is no longer any question in such cases whether there was 'sufficient justification' or not. The condition contained in these words as to trade disputes is made sufficient."

Reference may here be made to a class of cases in which it has been established that under certain circumstances one man may owe a duty to another, though there is no contract between them. The occupier of premises is under a duty to persons who may resort thereto in the course of business with which the occupier is concerned, upon his invitation express or implied, to take reasonable care that the premises are in a safe condition (z). The principle applies to movable as well as immovable property. The owner of a railway truck is under a duty to persons employed in unloading to take reasonable care that its condition is not so bad as to cause them injury (a); so with regard to a dock company and a gangway supplied by them to a ship in their dock (b); and a dock company supplying a staging for

(y) [1909] A. C. 506. The meaning of the words "act done in contemplation or furtherance of a trade dispute" is considered in the same case.

(z) *Indermaur v. Dames*, L. R. 1 C. P. 274; *Miller v. Hancock*, [1893] 2 Q. B. 177; *White v. France*, 2 C. P. D. 308; *Burchell v. Hickisson*, 50 L. J. Q. B. 101.

(a) *Elliott v. Hall*, 15 Q. B. D. 315.

(b) *Smith v. London and St. Katharine Docks Co.*, L. R. 3 C. P. 326.

painting a ship is liable for its condition to the painters using it (c), and the charterer of a ship is liable for negligence in allowing the stevedore's men to use a fixed iron ladder in the hatch which is out of repair (d). In *Mowbray v. Merryweather* (e), an employer to whom a defective chain had been negligently supplied by the defendant and whose servant was thereby injured, recovered from the defendant the amount of compensation for which he was liable, and which he had given, to the servant, and for which amount it was admitted that the defendant himself would have been liable to the servant.

Under the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28)—for which see Chitty's Statutes, tit. "Master and Servant"—provision is made requiring employers in certain industries to give notice of accidents which occur.

(c) *Heaven v. Pender*, 11 Q. B. D. 503; cf. *Caledonian Railway v. Mulholland*, [1898] A. C. 216; *Earl v. Lubbock*, [1905] 1 K. B. 253.

(d) *Marney v. Scott*, [1899] 1 Q. B. 986.

(e) [1895] 2 Q. B. 640.

CHAPTER V.

THE LIABILITY OF A MASTER TO THIRD PERSONS FOR THE ACTS OF
HIS SERVANT.

In Cases of Contract.

THE power which a servant possesses of binding his master by contracts entered into in his name is part of the general law of principal and agent. It is only upon the ground that the servant is the agent of his master that a master can in any case be made liable upon contracts entered into by his servant, and the principle on which the liability of the master upon such contracts depends is, that the act of the servant is, in fact, the act of the master; the maxim being, *Qui facit per alium, facit per se* (a).

Persons, such as infants and married women, who are under certain disabilities with regard to binding themselves by their own contracts, may nevertheless as agents for others do acts which will be binding upon the persons for whom they act (b).

But as a general proposition of law, "a person who does not himself enter into a contract, can only be made liable upon the contract if it was entered into by one who was his agent or servant

(a) See Bac. Abr. Master and Servant, K. Where a statute requires the signature of a contract or other document, the general rule is that the person whose signature is required may authorise an agent to sign for him: *R. v. Justices of Kent*, L. R. 8 Q. B. 305 (a notice of appeal to quarter sessions signed by solicitor's clerk held sufficient): *Re Whitley Partners, Ltd.*, 32 Ch. D. 337 (memorandum of association, signed by agent verbally authorised). But the terms in which the Act is drawn may be such as to require a personal signature, so that signature by an agent would not be sufficient. Thus under sect. 6 of Lord Tenterden's Act (9 Geo. IV. c. 14), by which it is enacted that no action shall be brought whereby to charge any person upon any representation as to the character or credit of another to the intent that such other person may thereby obtain credit money or goods, unless such representation be in writing signed by the party to be charged therewith, it has been held that signature by an agent is not a sufficient signature within the Act, even where the agent signed on behalf of a banking co-partnership which might sue and be sued in the name of its public officer: *Swift v. Jewsbury*, L. R. 9 Q. B. 301, 560; nor in the case of an agent signing for a limited company: *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560. See also *Hyde v. Johnson*, 2 Bing. N. C. 776, a decision on sect. 1 of the same Act.

(b) Co. Litt. 52 a; Bac. Abr. Authority, B.; Story on Agency, ss. 7 and 8, where see the rule of the civil law. See also *Emerson v. Blonden*, 1 Esp. 142; *Paletthorp v. Furnish*, 2 Esp. 511, note; *Prestwick v. Marshall*, 7 Bing. 565; *Lindus v. Bradwell*, 5 C. B. 583.

acting within the scope of his authority" (c). If a servant makes in his master's name, and with a person who deals in good faith, a contract which it is within his express written authority to make, his master will be bound by it, although the servant in fact made the contract for his own purposes and in his own interest (d).

It therefore becomes necessary to inquire what is the scope of authority entrusted to a servant with regard to binding his master upon contracts. The answer to this question involves the consideration of several others, for the authority of a servant to contract in his master's name may be given either expressly by deed, writing, or word of mouth; or by implication from the conduct of the master. And in either of those cases it may be general (*i.e.*, not unqualified, but to act in all cases of a particular nature), or it may be special (*i.e.*, to act in one particular instance) (e). Again, in any of the before-mentioned cases the authority given may be either limited by precise instructions, or unlimited (f).

Where authority to contract in his master's name is given to a servant by deed or writing, but little difficulty is likely to arise in ascertaining the extent of his authority, except, perhaps, from some ambiguity in the expressions used in the instrument conferring it. In such cases it is the duty of the Court to explain them, and they will be construed strictly (g). Letters containing private instructions as to the mode in which the authority given is to be exercised (as distinguished from the instrument conferring the authority), being documents of a less formal kind, will receive in general a more liberal construction. But where a servant intending to act in conformity with his instructions has acted in a manner contrary to his master's intention, the Court will, as between him and his master, construe them in a manner favourable to the servant and against the master, if they are capable of such a construction, upon the principle that *verba fortius accipiuntur contra proferentem* (h).

The effect of express verbal instructions to the servant will be considered hereafter (i), as it depends upon whether the servant has a general authority to act for his master, or is merely specially employed on one particular occasion.

(c) *Baumvoll Manufactur von Carl Scheibler v. Furness*, [1893] A. C. 8, per Lord Herschell, L.C., at p. 16. Though the contract made by a servant be one which it was within the scope of his authority to make, yet it will not be binding on his employer if a bribe has been given, or the promise of a bribe made, to the servant with a view of inducing him to act otherwise than with loyalty and fidelity to his employer: *ante*, p. 65.

(d) *Hambro v. Burnand*, [1904] 2 K. B. 10.

(e) *Whitehead v. Tuckett*, 15 East, 400, 408; Paley on Ag. 199.

(f) Paley on Ag. 2.

(g) *Howard v. Baillie*, 2 H. Bl. 618; *Attwood v. Munnings*, 7 B. & C. 278; *Bryant, Powis and Bryant v. La Banque du Peuple*, [1893] A. C. 170, 177; *Jacobs v. Morris*, [1902] 1 Ch. 816.

(h) Story on Ag. 74, 75; Lord Chelmsford in *Ireland v. Livingston*, L. R. 5 H. L. 416.

(i) *Post*, pp. 188-9.

If an agent has, without any authority, openly entered into a contract on behalf of an existing principal, the principal may ratify and adopt it so as to be deemed to be a party to the contract; but a company cannot by adoption or ratification obtain the benefit of a contract purporting to be made on its behalf before it came into existence; no principal there existed (*k*). This rule of law extends to a case where the agent in making the contract without authority has not mentioned the name of his principal, but in order to bring a case within the rule, the agent must have professed to the other party to the contract that he was acting as an agent, though for an undisclosed principal. It will not be enough that the agent had in his mind an intention to contract as agent: he must have openly professed to be acting as an agent, not for himself merely (*l*).

So where an agent makes a contract purporting to sell goods in the name of a principal, but with the fraudulent intention of selling them on his own account and for his own benefit, it is competent for the principal to ratify and take the benefit of the contract as against the buyers (*m*).

To constitute a binding adoption of acts *à priori* unauthorised, besides the necessity of the act having been done on behalf of the principal, there must be full knowledge by the principal of what those acts were or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were (*n*).

The fact that articles purchased by a servant have been used by the master will not alone make the master liable to pay for them where the previous conduct of the master was not such as to give the servant an implied authority to pledge his credit (*o*). That fact, however, would be sufficient *primâ facie* evidence to charge the master, unless he could discharge himself by showing either that the credit was given to the servant, or that the servant was supplied by him with ready money to pay for the articles purchased, and therefore had no authority to pledge his credit (*p*).

If no time is limited within which ratification by the principal is required, and ratification is made within a reasonable time, it will

(*k*) *Natal Land Co. v. Pauline Colliery Syndicate*, [1904] A. C. 120.

(*l*) *Keighley, Maxsted & Co. v. Durant*, [1901] A. C. 240, in which is discussed the judgment reported to have been delivered in *Bird v. Brown*, 4 Ex. 786.

(*m*) *Re Tiedemann and Ledermann Frères*, [1899] 2 Q. B. 66.

(*n*) *Marsh v. Joseph*, [1897] 1 Ch. 213.

(*o*) *Wright v. Glyn*, [1902] 1 K. B. 745; *post*, p. 194.

(*p*) *Pearce v. Rogers*, 3 Esp. 214. In *Forman & Co. Proprietary, Ltd. v. The Liddesdale*, [1900] A. C. 190, the plaintiffs sued for repairs done by them to the defendant's ship. They had done the repairs under a contract made with them by the defendant's agent, who, as the plaintiffs knew, had only a limited authority, and had done more repairs than the agent had power to contract for. It was held that, though the defendant had taken the ship as repaired and had sold it, he did not thereby ratify the contract.

relate back to the time of the making of the contract (*q*), unless the interests of persons other than the parties to the contract are affected (*r*).

A master cannot, however, avail himself by adoption of an act done in his name, which, in order to be valid at all, ought to have been valid at the time it was done. Such, for instance, as a notice to quit, since such a notice, to be good, must be one that the party to whom it is given may act upon it immediately (*s*). It is conceived, however, that even if such a notice were given, in his master's name, by a servant not authorised to give it, to a tenant from year to year, and the master ratified it and gave notice to the tenant of such ratification before the commencement of the last half of the tenancy, such ratification would render the notice valid (*t*): though that might, perhaps, more properly be called a fresh notice to quit given by the master himself.

Where a master adopts and ratifies a contract made by his servant, he adopts it *in toto*, and cannot adopt part, and repudiate the part which he had not previously authorised the servant to agree to: *e.g.*, if a man, not a horsedealet, authorises a servant to sell a horse, and expressly orders him not to warrant or sell the horse upon any condition, yet, if the servant sell the horse upon condition to be returned if not approved of by the purchaser, and the master receive the price, he thereby ratifies the contract and the condition; and, if the horse be returned, is bound to return the money (*u*).

Where a master has admitted his liability upon a contract made by his servant, the weight due to that admission depends on the circumstances under which it was made (*x*). If no other person has been induced by it to alter his condition, the master is not concluded or estopped by it, but may prove it to have been mistaken or untrue (*y*).

Where the authority of a servant to bind his master upon contracts arises merely by implication, the general rule is, that the authority of a servant is co-extensive with his usual employment, and the scope of his authority is to be measured by the extent of his employment (*z*).

(*q*) *Bolton Partners v. Lambert*, 41 Ch. D. 295. See as to this case, *Dibbins v. Dibbins*, [1896] 2 Ch. 348; *Fleming v. Bank of New Zealand*, [1900] A. C. 577 at p. 587.

(*r*) *Re Gloucester Municipal Election Petition*, 1900; *Ford v. Newth*, [1901] 1 Q. B. 683.

(*s*) *Doe v. Walters*, 10 B. & C. 626; *Doe v. Goldwin*, 2 Q. B. 146; and see per Lord Wensleydale, in *Buron v. Denman*, 2 Ex. 188; Story on Ag. s. 246; *Jones v. Phipps*, L. R. 3 Q. B. 567.

(*t*) *Bird v. Brown*, 4 Ex. 799; *Jardine v. Leathley*, 32 L. J. Q. B. 132.

(*u*) *Foster v. Smith*, 18 C. B. 156; *Pauling v. London and North Western Railway Co.*, 8 Ex. 867; *Ramazzotti v. Bowring*, 29 L. J. C. P. 30; but see *Bosanquet v. Forster*, 9 C. & P. 659; *Same v. Corser*, *Ibid.* 665.

(*x*) *Newton v. Belcher*, 12 Q. B. 921.

(*y*) *Newton v. Liddiard*, 12 Q. B. 925; and see *Pickard v. Sears*, 6 A. & E. 474; *Freeman v. Cooke*, 2 Ex. 654.

(*z*) *Smith's Merc. Law*; *Paley on Ag.* 162; *Poth. on Obl.* by Evans, No. 456.

For a master who accredits a servant by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether he intended to authorise them or not, or even if he expressly though privately forbade them; it being a general rule of law, founded on natural justice, that where one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer (a), but this principle does not apply to a case where nothing has been done by one of the innocent parties which has in fact misled the other (b). Upon this principle, where a servant usually buys for his master upon credit, and the master is in the habit of paying for goods so purchased, the master is liable to pay for any goods of a similar nature which the servant may obtain upon credit, even though, in a particular instance, the master furnish the servant with money to pay for the goods and the servant embezzle the money; or even if the servant after he has been discharged pledge his master's credit, unless the party giving credit knew that the servant was discharged (c); the master in fact being estopped from denying the authority of the servant to bind him (d). Thus, the defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards. He sent the same waterman a second time with ready money, who received the goods but did not pay for them; the defendant was held liable "for the sending him upon trust the first time, and paying for the goods was giving him credit so as to charge the defendant upon the second contract" (e).

So where (f) a master used to give his servant money every Saturday to defray the charges of the foregoing week. The servant kept the money, yet per Holt, C.J.: "The master is chargeable; for the master, at his peril, ought to take care what servant he employs, and

(a) *Lickbarrow v. Mason*, 2 T. R. 63, per Ashurst, J.

(b) *Farquharson Bros. & Co. v. King & Co.*, [1902] A. C. 325.

(c) *Nickson v. Brohan*, 10 Mod. 109; *Anon.*, 1 Show. 95; *Aishcombe v. Hundred of Spelholme*, Holt, 460; — *v. Harrison*, 12 Mod. 346; *Sir Robert Wayland's Case*, 3 Salk. 234; *Anon.*, 12 Mod. 564; *Boulton v. Arlson*, 3 Salk. 234; 1 Lord Raym. 225.

(d) See per Erle, C.J., *Ex parte Swan*, 30 L. J. C. P. 113.

(e) *Hazard v. Treadwell*, 1 Str. 506. See, however, *Todd v. Robinson*, Ry. & M. 217; *Gilman v. Robinson*, Ry. & M. 226. A general agency to order goods could hardly be implied from a single recognised dealing. In most cases it would be a question for a jury whether the defendant held out the servant as his agent for the purpose of ordering the goods in question. In *Spooner v. Browning*, [1898] 1 Q. B. 528, the plaintiff on three occasions gave orders for the purchase of shares to a certain clerk of the defendants, a firm of stockbrokers. These orders the defendants executed. It was held that this was no evidence that the defendants had held out the clerk as being authorised by them to enter into binding contracts on their behalf, or to represent that the defendants would execute any orders which the clerk might accept.

(f) *Sir R. Wayland's Case*, 3 Salk. 234; and see *Miller v. Hamilton*, 5 C. & P. 433.

it is more reasonable that he should suffer for the cheats of his servant than strangers or tradesmen."

Again, where (g) a gentleman kept a book with his coachman in which were entered the articles procured by, and the sums advanced to, him; but there did not appear to be any connection between the sums advanced and the demands he was to pay, but the money was advanced generally: the gentleman was held liable to pay for hay and straw delivered for the use of his horses, although he had given the coachman money to pay the bills, which he had embezzled.

So where the defendant, a jeweller, kept a shop in the country, living himself in London, and visiting the country shop once a month to take stock, &c. The country shop was managed by a shopman, A., from whom the plaintiff had for some years been in the habit of receiving orders in the country in the defendant's name, for goods which were sent to the country shop, and afterwards were paid for by the defendant. A. absconded, went to London and ordered jewellery there of the plaintiff in the defendant's name, which he carried away with him: it was held that the previous course of dealing justified the plaintiff in assuming that A. had general authority to order goods for the shop on the defendant's credit, and that the defendant was, therefore, liable for the goods obtained by A. in London (h).

And if the master was originally liable for a debt incurred by his servant, he could not discharge himself by merely giving the servant money to pay it (i).

Upon similar principles the owner of a saw-mill was held (k) bound by a contract entered into by his foreman to furnish the plaintiff with a large quantity of Scotch fir staves; as a foreman employed to conduct a business like that in which the defendant was engaged must be taken to have a general authority to bind his master by such contracts. And a clerk left in charge of a company's office in office hours is to be presumed to have authority to receive a notice so as to make it a communication to the company (l). And if a person goes to the office of a carrier and asks what a thing will be done for, and he is told by a clerk, or servant, who is transacting the business there, that it will be done for a certain sum, the master can charge no more, although he has previously ordered his clerks to charge more (m). The fact that the servant has made a bad bargain gives the master no equity to be relieved from it (n).

(g) *Rusby v. Scarlett*, 5 Esp. 76.

(h) *Summers v. Solomon*, 7 E. & B. 879. Bramwell, B., did not assent to the law laid down in this case: *Hambro v. Hull and London Fire Insurance Co.*, 3 H. & N. 789 at p. 794.

(i) *Heald v. Kenworthy*, 10 Ex. 739.

(k) *Richardson v. Cartwright*, 1 Carr. & K. 328; see *Thompson v. Bell*, 10 Ex. 10, where a joint-stock bank was held bound by an act of the manager; and *Pauling v. London and North Western Railway Co.*, 8 Ex. 867.

(l) *Re Brewery Assets Corporation, Truman's Case*, [1894] 3 Ch. 272.

(m) *Winkfield v. Packington*, 2 C. & P. 599. (n) *Griffiths v. Jones*, 15 Eq. 279.

So again where the granary clerk to a cornfactor said "all right" when a delivery order for flour was presented, his master was held to be estopped from saying that no property had passed for want of appropriation of the flour (o).

A registered company established for the manufacture of glass had power under their deed of settlement to appoint a manager of their works, &c., to "superintend and transact, under the control of the board of directors, the manufacturing business of the company," and to whom the board of directors were, by another part of the deed, authorised to delegate "such and so many of the powers thereby given to them as would enable him to carry on the said works and manufacturing business in an efficient manner." It was held that the company were liable for goods supplied to them for the purposes of their manufactures upon orders given by such manager, although there was no express delegation of authority (p).

So where seven persons signed a memorandum of association of a company for making bricks, and two of them, one professing to act as managing director, and the other as chairman of the company, engaged the plaintiff as foreman of certain brickworks, it was held that in the absence of proof to the contrary the company must be taken to have given authority to such two persons to engage the plaintiff, and was liable to pay his wages (q).

So where goods were ordered by the purser of a mine on the cost-book principle, a shareholder was held liable (r).

So provisional directors have been held liable to pay for advertisements which they passed a resolution to insert, and which resolution was acted on by the secretary (s).

So where the plaintiffs trading as S. & Co., sold goods to the defendant, who paid for them by cheque payable to S. & Co., and K. their manager indorsed the cheque "S. & Co., per K. agent," though he had no authority to do so, and the cheque was paid by the bankers, the defendants were held to be discharged (t).

The principle of presumptive agency on which these cases were decided has been extended to cases in which the person who assumed to act as servant was not really servant, but was considered to have been held out as servant by the act of the master (u).

(o) *Woodley v. Coventry*, 32 L. J. Ex. 185.

(p) *Smith v. Hull Glass Co.*, 11 C. B. 668; see also *Greenwood's Case*, 3 De G. M. & G. 459; *Ernest v. Nicholls*, 6 Ho. Lords Cas. 401; *Forbes v. Marshall*, 11 Ex. 166, 179; *Re Athenæum Life Assurance Co.*, 27 L. J. Ch. 829; *Agar v. Same Company*, 3 C. B. (N. S.) 725; *Prince of Wales Assurance Society v. Harding*, 27 L. J. Q. B. 297.

(q) *Totterdell v. Fareham Blue Brick and Tile Co.*, L. R. 1 C. P. 674.

(r) *Geake v. Jackson*, 36 L. J. C. P. 108.

(s) *Maddick v. Marshall*, 16 C. B. (N. S.) 387; 17 C. B. (N. S.) 829; and see *Riley v. Packington*, L. R. 2 C. P. 536.

(t) *Charles v. Blackwell*, 2 C. P. D. 151.

(u) In *Sandeman v. Scurr*, L. R. 2 Q. B. 86, Cockburn, C.J., at p. 97, speaks of "the well-known principle that, where a party allows another to appear before the

Thus a merchant has been held bound by a payment in the usual course of business to a person found in his counting-house, and appearing to be entrusted with the conduct of the business there, though it turned out that the person was never employed by him, and the money never came to his hands: for, said Lord Tenterden: "The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority" (x). And so a tender to a person, probably a chief clerk, in the office of an attorney, who refused to accept the amount tendered as insufficient, has been held good: being equivalent to a tender to the attorney himself (y). And an attorney has been held liable to refund money and pay the costs of the application where some one in his office extorted an excessive sum for costs, although the matter did not come to his personal cognizance (z). And payment to a sheriff's bailiff's assistant has been held good as against the sheriff (a).

Again, although "it may be admitted that an authority to draw, does not import in itself an authority to indorse bills," still the evidence of such authority to draw is not to be withheld from the jury, who are to determine on the whole of the evidence whether such authority to indorse exist or not (b). And, therefore, where the defendants' confidential clerk had been accustomed to draw cheques for them, and in one instance, at least, they had authorised him to indorse, and in two other instances had received money obtained by his indorsing in their names, a jury were held warranted in inferring therefrom that the clerk had a general authority to indorse (c).

And in a case (d) in which the defendant was held liable upon a charterparty signed by his brother ("per proc. of" the defendant), whom he had left at Limerick to conduct his business, which consisted in buying up corn for shipment, Pollock, C.B., observed: "It would be most inconvenient if a person could not go into a shop and purchase an article without first asking the shopman whether he has authority to sell it. It may be that he was merely employed to sweep the shop; but it would be absurd to apply to the general business of life the doctrine as to the necessity of ascertaining whether an agent is acting within the scope of his authority—indeed, the business of

world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency."

(x) *Barrett v. Deere*, Moo. & M. 200; and see per Maule, J., in *Smith v. Hull Glass Co.*, 11 C. B. 897 at p. 928; and in *Mitcheson v. Oliver*, 5 E. & B. 419.

(y) *Wilmott v. Smith*, Moo. & M. 238. In *Moffat v. Parsons*, 5 Taunt. 307, tender of payment to a servant who, in pursuance of his master's orders, refused to accept it, was held a good tender to the master.

(z) *Palmer v. Evans*, 1 C. B. (N. S.) 151.

(a) *Gregory v. Cotterell*, 5 E. & B. 571.

(b) *Prescott v. Flinn*, 9 Bing. 22, per Tindal, C.J.

(c) *Ibid.*; and see *Barber v. Gingell*, 3 Esp. 60; *Llewellyn v. Winckworth*, 13 M. & W. 598.

(d) *Smith v. M'Guire*, 3 H. & N. 554.

London could not go on." And he afterwards said: "When the holder of a bill has ascertained that the person who has accepted the bill as agent or by procuration is a clerk in the house, and in the course of his employment has from day to day accepted bills of that sort, that is enough, and he need not ask for his power of attorney or authority, nor whether that particular bill is on account of the firm. When you find him in the house acting and recognised as the agent of the firm, you need not make any further inquiry, and yet it may turn out that he has never accepted a bill without a schedule being laid before him in the morning of all bills that were to be accepted by him on that day. Persons are supposed to carry on their business according to the ordinary arrangement of mankind generally. If a person conducts his business as the defendant did, by an agent who acts in his absence, in my judgment it is a question for the jury whether, according to the ordinary mode in which business is carried on, the reasonable conclusion to be drawn from these circumstances is not that he had authority as a general agent, and, if so, the principal is bound, though it should turn out that he had limited the extent of the agency by certain rules and regulations."

Where a servant is employed to transact business, and has no particular orders with reference to the manner in which the business is to be transacted, he is considered as invested with all the authority necessary for transacting the business entrusted to him, and which is usually entrusted to agents (*e*), employed in matters of a similar nature. In this respect there is no distinction whether the authority be general or special, express or implied. In each case it embraces the appropriate means to accomplish the desired end (*f*). Thus a servant sent without money to buy goods has implied authority to pledge his master's credit (*g*).

Upon this principle it was held in a very old case (*h*) that if a goldsmith make plate wherein he mingles dross, so that it is not according to the standard, and send his servant to a fair to sell it, who sells it for good plate, according to the standard, an action upon the case lies against the master.

So also where a person, who was not a horsedealer, sent his servant with his horse to *Tattersall's* for sale, with instructions to warrant him sound, and he warranted him free from vice; the master was held liable upon the warranty, although it was contended on his behalf that the servant was but a special agent, and he having exceeded his authority, the master ought not to be bound. But, said Lord Ellen-

(*e*) Story on Ag. 60; and see per Lord Wensleydale, in *Cox v. Midland Counties Railway Co.*, 3 Ex. 278.

(*f*) Story on Ag. 85, 97; *Howard v. Baillie*, 2 H. Bl. 618.

(*g*) *Tobin v. Crawford*, 9 M. & W. 716, per Tindal, C.J., at p. 718.

(*h*) *Southern v. How*, Cro. Jac. 471; *Hern v. Nicholls*, 1 Salk. 289. As to how the master is affected by fraud of his servant, see *Cornfoot v. Fowke*, 6 M. & W. 358; and other cases cited *post*, p. 215.

borough, C.J.: "the master having entrusted the servant to sell, he is entrusted to do all that he can to effectuate the sale, and if he does exceed his authority in so doing he binds his master" (i). And in another case (k), where the defendant's servant, who was entrusted to sell and receive the price, sold a horse at a fair to the plaintiff, and warranted him sound, the defendant was held liable for a breach of the warranty; and Lord Ellenborough said: "If the servant was authorised to sell the horse, and to receive the stipulated price, I think he was incidentally authorised to give a warranty of soundness. It is now most usual on the sale of horses to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done, and the agent must be taken to be vested with power to transact the business with which he is entrusted in the common and usual manner. I am of opinion, therefore, that if the defendant's servant warranted this horse to be sound the defendant is bound by the warranty."

But where a tradesman, who was not a horsedealer, had a farm which was managed by a bailiff named G., and G., by his authority, sold a horse to the plaintiff, and also gave a warranty which he was not authorised to give, it was held that the defendant was not liable upon the warranty (l). And upon the foregoing cases, *Helyear v. Hawke*, *Alexander v. Gibson*, and *Fenn v. Harrison* being cited, Erle, C.J., said: "We understand the judges in those cases to refer to a general agent employed for a principal to carry on his business, that is, the business of horse-dealing, in which case there would be by law the authority here contended for. But the facts of the present case do not bring the defendant within this rule, as he was not shown to carry on any trade of dealing in horses. . . . The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale, and that the question of warranty is in the usual course of a sale required to be answered; and that therefore the defendant by implication gave to G. an authority to answer that question, and to bind him by his answer. It was a part of this argument that an agent authorised to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point also the plaintiff has, in our judgment, failed. We are aware that the question of warranty

(i) *Helyear v. Hawke*, 5 Esp. 72. In *Smith v. M'Guire*, 3 H. & N. 563, Pollock, C.B., said: "If a man sends his servant to market to sell goods, or a horse for a certain price, and the servant sells them for less, the master is bound by it." See also *Woodin v. Burford*, 2 Cr. & M. 391; *Coleman v. Riches*, 16 C. B. 105; *Dingle v. Hare*, 29 L. J. C. P. 143; *Udell v. Atherton*, 7 H. & N. 172; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Howard v. Sheward*, L. R. 2 C. P. 148; *Biggs v. Evans*, [1894] 1 Q. B. 88.

(k) *Alexander v. Gibson*, 2 Camp. 555; see 16 C. B. 113.

(l) *Brady v. Todd*, 9 C. B. (N. S.) 592. See *Brooks v. Hassall*, 49 L. T. 569, and *Baldry v. Bates*, 1 T. L. R. 558.

frequently arises upon the sale of horses; but we are also aware that sales may be made without any warranty or even an inquiry about warranty. If we laid down for the first time that the servant of a private owner entrusted to sell and deliver a horse on one particular occasion, is, therefore, by law authorised to bind his master by a warranty, we should establish a precedent of dangerous consequence. . . . We therefore hold that the buyer taking a warranty from such an agent as was employed in this case takes it at the risk of being able to prove that he had the principal's authority, and if there was no authority in fact, the law from the circumstances does not in our opinion create it.

"When the facts raise the question it will be time enough to decide the liability created by such a servant as a foreman alleged to be a general agent, or such a special agent as a person entrusted with the sale of a horse in a fair or other public mart where stranger meets stranger; and the usual course of business is for the person in possession of the horse, and appearing to be the owner, to have all the powers of an owner in respect of the sale. The authority may, under such circumstances as are last referred to, be implied, though the circumstances of the present case do not create the same inference."

It may be convenient to mention in this place the case of *Stewart v. Beaumont (m)*, though that was an action for malicious prosecution. The defendant, who was a colonel in the army, had been at Aldershot, and a soldier named K. had acted as his servant there. On leaving camp defendant left a horse behind, and told K. that if he could find a person willing to buy the horse for £17 he should let defendant know, as he was ready to dispose of him for that sum. K. sold the horse to plaintiff, a respectable farmer, for £10, and absconded with the money. Defendant, finding plaintiff had the horse, claimed it, but he refused to give it up, declaring he had bought it honestly. Defendant obtained a search warrant, having sworn to a deposition that the horse was "stolen," and that it was "concealed" on plaintiff's premises. The plaintiff was not privy to K.'s fraud, and bought honestly. The defendant denied any authority to K. to sell, and declared that his doing so was dishonest. But Erle, C.J., pointed out that K. having possession of the horse, and being held out by the defendant as having authority to sell it, K.'s dishonesty as between him and his master was quite immaterial to the question in the present case, which was reasonable and probable cause for charging the plaintiff with stealing it. If either there was an authority to sell, or if defendant allowed K. to appear as having authority, then plaintiff was owner of the horse and entitled to recover; there was no reasonable or probable cause. The plaintiff recovered a verdict.

But although a warranty by a servant entrusted to sell, given at the time of sale, and as part of the transaction of selling, may bind the master, yet an acknowledgment to that effect, made at another time, would not bind him (*n*). And where there had been a previous bargain between the plaintiff and the defendant, who was a horse-dealer, for the sale of a horse, and the defendant's servant, being sent to deliver the horse and receive the price, gave a warranty, the defendant was held not liable (*o*).

And so a master has been held not bound by an alteration in a warranty made by a servant sent to receive the price (*p*).

These two last-mentioned cases, however, depend upon the general rule, that an implied authority cannot be extended to collateral transactions.

Thus, though a clerk, apprentice, or shopman, may have an implied authority to receive money paid in the usual course of business, you could not from that infer an authority to receive payments out of the usual course of business, as deposit on a wager, payment of a mortgage, legacy, or the like (*q*). So, a clerk who has authority to receive cash across the counter, has not authority to receive payments by cheque by post (*r*), or by setting off amount due to his master against amount due from him, the clerk, to his master's debtor (*s*). So, a general manager of a railway company has no authority to enter into a contract respecting land (*t*). So, a clerk employed to obtain orders, is not by reason thereof authorised to receive payment for goods supplied (*u*); and a debtor paying him, makes him his agent to hand the money to the creditor, and if he fails to do so, must pay over again. So, a traveller who receives orders for goods from his employer's customers, if authorised to receive payment for them in money, cannot take other goods in payment (*x*).

But although an authority to accept or indorse bills would not of itself authorise a clerk to pay or receive money due on such bills; yet if in the course of his employment a clerk has, with the knowledge of

(*n*) *Helyear v. Hawke*, 5 Esp. 72; *Peto v. Hague*, 5 Esp. 134; *Allen v. Denstone*, 8 C. & P. 760.

(*o*) *Woodin v. Burford*, 2 Cr. & M. 391.

(*p*) *Strode v. Dyson*, 1 Smith, 400.

(*q*) *Sanderson v. Bell*, 2 Cr. & M. 304; and see *Sykes v. Giles*, 5 M. & W. 645, where it was held that an auctioneer, expressly authorised by the conditions of sale to receive a deposit, had no implied authority to receive the residue of the purchase-money. See also *Boulton v. Reynolds*, 29 L. J. Q. B. 11, where it was held that a man in possession of goods distrained for rent has no authority in law to receive the rent.

(*r*) *Kaye v. Brett*, 5 Ex. 269. As to whether authority to an agent to receive money implies that he is to receive it in cash only and not in any other form, see *Papé v. Westacott*, [1894] 1 Q. B. 272.

(*s*) *Sweeting v. Pearce*, 30 L. J. C. P. 109.

(*t*) *Wilson v. West Hartlepool Harbour and Railway Co.*, 34 L. J. Ch. 241.

(*u*) *Puttock v. Warr*, 31 L. T. Rep. (O. S.) 86.

(*x*) *Howard v. Chapman*, 4 C. & P. 508.

his master, been allowed to do so, that would constitute a sufficient authority for that purpose, and discharge the holders of the bills (*y*).

And a clerk to a wine merchant who is authorised by his master to sign delivery orders per procuration, and by so doing obtains possession of dock warrants relating to wine belonging to his master, cannot afterwards bind his master by obtaining an advance of money upon such dock warrants, nor is he an agent entrusted with the possession of the documents of title to goods within the meaning of the Factors Act (5 & 6 Vict. c. 39), and if he pledge the dock warrants his master may recover them from the holder (*z*).

Admissions by an agent will be admissible against his principal when made in the course of a transaction with a third party, in which he was acting as agent of his principal, provided that the making of such admission was within the scope of his agency (*a*).

So, in an action against pawnbrokers (*b*) to recover plate deposited with them upon a mortgage, out of the usual course of business, an admission by a shopman of the defendants that they had the plate was held not admissible as evidence against them, for the transaction was not a transaction in the business of a pawnbroker, but a loan, as by any other lender of money at five per cent., and there was no evidence to show the agency of the shopman in private transactions, unconnected with the business of the shop. And Tindal, C.J., said, "If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant, as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. In that case the rule laid down by the Master of the Rolls in the case of *Fairlie v. Hastings* (*c*), which may be regarded as the leading case on this head of evidence, directly applies."

So, in an action against carriers by railway for not delivering cattle within a reasonable time, an admission made a week after the transaction by a night inspector who had charge of the night cattle trains

(*y*) *Pole v. Leask*, 29 L. J. Ch. 888, 893; affirmed 33 L. J. Ch. 155.

(*z*) *Lamb v. Attenborough*, 31 L. J. Q. B. 41. The Factors Act, 1889 (52 & 53 Vict. c. 45), applies to persons of the class ordinarily carrying on the business of mercantile agents, not to persons in the position merely of servants: *Hastings, Ltd. v. Pearson*, [1893] 1 Q. B. 62.

(*a*) *Kirkstall Brewery Co. v. Furness Railway Co.*, L. R. 9 Q. B. 468; *Re Devala Provident Gold Mining Co.*, 22 Ch. D. 593.

(*b*) *Garth v. Howard*, 8 Bing. 451; see *Gardner v. Moulton*, 10 A. & E. 464, where the defendants were held bound by an admission by their servant of an act of bankruptcy on the part of a bankrupt.

(*c*) 10 Ves. 128; and see Story on Ag., s. 136; *Price v. Marsh*, 1 C. & P. 60; *Jones v. Hart*, Lord Raym. 738.

at a station through which the trucks containing the plaintiff's cattle would pass, that he had forgotten the plaintiff's cattle, was held not to be evidence against the defendants, as he was not to be presumed to have been authorised by the company to make admissions on their behalf of things gone by (*d*).

And it would be no answer to an action by a master against carriers for loss of, or injury to, his goods, that they had received them from a servant, and had settled with him, unless the servant was authorised by his master to settle (*e*). And an estate or farm agent employed to receive rents, and conduct such farming operations as repairing, draining, cutting timber, and the like, could not, without express authority, make admissions in writing, or otherwise, as to his employer's title, or bind him by proposals to purchase, or take on lease, the lands of another (*f*).

Upon similar principles it is that, although an entry made at the time when the facts recorded took place by a deceased clerk or other servant in the usual course of business, is evidence, after his decease, of the facts stated in such entry; yet, if other facts, not usually stated in entries of a similar nature, happen to be mentioned in making a particular entry, it is not evidence of those facts (*g*).

Moreover, the implied power of a servant to bind his master upon contracts relating to matters within the usual scope of his employment, is not increased by the emergency of any particular occasion (*h*). And, therefore, where (*i*) a mining company fell into difficulties in consequence of the calls not being paid up, and the agent from want of funds was unable to pay the labourers, who applied to the magistrates and obtained warrants of distress upon the materials belonging to the mine: whereupon the agent borrowed money upon the credit of the company, and paid the wages, it was held that he had no implied authority to do so; although there were circumstances in the case from which a jury might have inferred an express authority to borrow money for the purposes of the mine.

So it was held in one case (*k*) that a station master had no implied authority in case of accident to bind the company by calling in a

(*d*) *Great Western Railway Co. v. Willis*, 18 C. B. (N. S.) 748. On a question under the Truck Act, 1831, colliery owners were held not bound by any act or declaration as to disposal of wages made by either the overman or the coal clerk: *Olding v. Smith*, 16 Jur. 497.

(*e*) *Coombs v. Bristol and Exeter Railway Co.*, 3 H. & N. 1.

(*f*) *Ley v. Peter*, 3 H. & N. 101.

(*g*) *Chambers v. Bernasconi*, 1 C. M. & R. 347; see *Price v. Earl of Torrington*, 2 Sm. L. C. 320; 1 Ph. on Ev., ch. 7, s. 8, where all the prior cases are stated and commented on. See also *R. v. Dukinfield*, 11 Q. B. 678; *Smith v. Blakey*, L. R. 2 Q. B. 326.

(*h*) Story on Ag. 87. See further on this point the cases of tort, *post*.

(*i*) *Hawthorne v. Bourne*, 7 M. & W. 595; and see *Ricketts v. Bennett*, 4 C. B. 686; *Re German Mining Co.*, 22 L. J. Ch. 926; *Gwilliam v. Twist*, [1895] 2 Q. B. 84.

(*k*) *Cox v. Midland Counties Railway Co.*, 3 Ex. 268; followed in *Houghton v. Pilkington*, [1912] 3 K. B. 308.

surgeon to attend on passengers, for the power to enter into such a contract was not incident to his employment. That case was distinguished when it was held that a general manager (l) had implied authority to call in surgical aid for persons injured on the company's lines: and that in the case of a chief inspector of railway police who was for the time the superior of the station master (n), there was evidence to go to the jury that he had such authority.

It makes no difference in the master's liability that the contract is made in the servant's name, if in reality he were acting as agent for his master in making the contract. For "parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own" (n).

And so if a landed proprietor send his steward habitually to the neighbouring fairs and markets to make sales and purchases for him in matters connected with the management of his estate, and the steward makes all these contracts in his own name, but is universally known to have no land of his own, and to be acting solely for his employer, by his direction, and on his credit; the steward's intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing could not deprive the vendor of his recourse against the master (o).

And, since the nature of the usual employment of a servant is the measure of his implied authority, it follows that that authority can neither be limited by the private instructions of the master, nor controlled by any secret agreement between him and his servant. If this could be done, in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communication with their principals! There would be an end of all dealing but with the master (p). Should the servant deviate from his master's orders, or be guilty of a breach of any secret agreement between himself and his master, he will be accountable to his master for any loss he may sustain thereby, but third persons cannot be affected by any limitation of the servant's authority not communicated

(l) *Walker v. Great Western Railway Co.*, L. R. 2 Ex. 228.

(m) *Langan v. Great Western Railway Co.*, 30 L. T. 173.

(n) *Trueman v. Loder*, 11 A. & E. 594, per Lord Denman, C.J., at p. 595; and see *Thomson v. Davenport*, 2 Sm. L. C. 379. Where a servant or other agent has signed a written contract in his own name, he cannot give parol evidence to discharge himself from liability upon the contract: *Higgins v. Senior*, 8 M. & W. 834.

(o) *Trueman v. Loder*, 11 A. & E. 589, per Lord Denman, at p. 593.

(p) *Nickson v. Brohan*, 10 Mod. 110.

to them (q). In such cases, however, it is material to bear in mind the distinction before adverted to, between a special and a general authority ("the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances, whereas the former is confined to an individual instance") (r), as the legal effect of secret instructions is very different in the two cases. The difference cannot be more clearly stated than in the words used in Smith's Mercantile Law (s): "A general agent is a person whom a man puts in his place to transact all his business of a particular kind. . . The authority of such an agent cannot be limited by any private order or direction not known to the party dealing with him. The rule is directly the reverse concerning a particular agent, i.e., an agent employed specially in one single transaction; for it is the duty of the party dealing with such a one to ascertain the extent of his authority; and if he do not he must abide the consequences" (t).

A servant may be regarded as the general agent of his master for all purposes within the scope of his employment. If employed for any unusual purpose, he may be looked upon as the special agent of his master (u). Thus, for instance, if a man were in the habit of paying for hay and straw purchased by his groom, the groom might be regarded as his general agent for the purchase of a reasonable quantity of hay and straw, and the master would be liable to pay for such hay and straw purchased by the groom, even if in a particular instance the groom acted contrary to his master's orders. But such a groom could not be looked upon as the general agent of his master,

(q) Paley on Ag. 199; 1 Pothier on Oblig. by Evans, n. 79; see also *Ibid.*, n. 447, 448; *Cahill v. Dawson*, 3 C. B. (N. S.) 106.

(r) *Whitehead v. Tuckett*, per Lord Ellenborough, 15 East, 408; and see Paley on Ag. 199.

(s) Smith's Merc. Law, 11th ed., p. 159; see Story on Ag., s. 126, and note 2 to s. 127; *Hawken v. Bourne*, 8 M. & W. 703; *National Bolivian Navigation Co. v. Wilson*, 5 App. Cas. 176, per Lord Blackburn, at p. 209.

(t) Mr. Justice Story, after quoting the words in the text, adds: "This is true if the agent is not held out as possessing a more enlarged authority." Story on Agency, s. 126, note. In *Edmunds v. Bushell*, L. R. 1 Q. B. 97, Cockburn, C.J., speaks of "the well-established principle, that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority." So in *Watteau v. Fenwick*, [1893] 1 Q. B. 346, the owners of a hotel were held liable to pay for cigars ordered by the manager. The licence was taken out in the manager's name, and his name was painted over the door. He had been forbidden by the defendants to buy cigars on credit, but, nevertheless, in contravention of his instructions, he bought on credit from the plaintiff cigars such as would usually be supplied to and dealt in at such an establishment as that which he managed for the defendants. So if the indicia of title are entrusted to an agent for any purpose, it is the duty of his employer to communicate to the persons whom he intends shall act upon the authority given to the agent any limitations on the agent's authority to deal with such indicia: *Brocklesby v. Temperance Permanent Building Society*, [1895] A. C. 173; *Rimmer v. Webster*, [1902] 2 Ch. 163.

(u) The nature and extent of a servant's implied authority must, however, as is obvious, frequently involve questions fit for the consideration of a jury. See *Dyer v. Pearson*, 3 B. & C. 38; *Todd v. Robinson*, Ry. & M. 217; *Gilman v. Robinson*, Ry. & M. 226; *Barnett v. Lambert*, 15 M. & W. 493; *Reynell v. Lewis*, 15 M. & W. 517; *Williams v. Pigott*, 2 Ex. 201.

so as to render him liable to pay for anything else the groom might choose to buy in his master's name, the obtaining other things not being within the scope of his employment. If he were sent by his master with money to purchase beer or wine, he would be a special agent for that occasion; and if the person of whom he bought it chose to let him take it away without payment and without ascertaining that he had authority to pledge his master's credit, he must abide the consequences: the master would not be liable.

Bearing, therefore, this distinction in mind, it may be stated as a general rule, that wherever a master has by words, conduct or demeanour held out his servant as his general agent, whether in all kinds of business or in transacting business of a particular kind, the master will be bound by the act of his servant, if within the scope of his usual employment, notwithstanding the servant has acted contrary to his master's orders.

Thus, (x) a master sent his servant, who was used to transact affairs of that nature for him, on Saturday, with a note drawn on Sir S. E., with orders to get from Sir S. E. either bank bills or money and turn them into Exchequer notes, but the servant, to save himself time and trouble, went to B., and prevailed with him to give him a bank bill for the note upon Sir S. E., and then, in pursuance of his master's orders, invested it in Exchequer notes, which he brought to his master, not letting him know but that he had gone to Sir S. E. Sir S. E. failed upon the Monday following. The question was upon whom the loss should fall, B. or the master. And the whole Court were of opinion that the master was chargeable and he only; for a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; and, if this general authority should be liable to be determined for a time by any particular instructions or orders to which none but the master and servant are privy, there would be an end of all dealing but with the master.

If a third party, dealing with his servant on behalf of his master, know of the private agreement or instructions given by the master to his servant, he cannot of course charge the master (y) upon any contract contrary to that agreement. Accordingly, where (z) the defendant sent his son to obtain from the plaintiff a horse which he

(x) *Nickson v. Brohan*, 10 Mod. 109; *Ward v. Evans*, 2 Salk. 442; *Thorold v. Smith*, 11 Mod. 71, 87; see *Duke of Beaufort v. Neeld*, 12 Cl. & F. 248; *Smith v. M'Guire*, 3 H. & N. 554. In *Bunch v. Great Western Railway Co.*, 17 Q. B. D. 215 (affirmed 13 App. Cas. 31), where a question arose as to the scope of a railway porter's authority with regard to passengers' luggage, Lord Esher, M.R., said (at p. 219) that "with regard to the public, the scope of a porter's authority is to be measured by what the company deliberately allow their porter to do, and they cannot say that a porter is acting beyond the scope of his authority with regard to the public, by reason of some secret orders which they have given to him."

(y) *Howard v. Braithwaite*, 1 Ves. & B. 209.

(z) *Jordan v. Norton*, 4 M. & W. 155. In this case, however, it will be observed that the son was a *special agent*, into whose authority the party dealing with him is bound to inquire.

had agreed to sell to the defendant, and the plaintiff knew that the son was instructed only to take the horse if warranted, but the son took it without a warranty, it was held that the defendant was not liable to pay for the horse, which did not answer the warranty agreed to be given.

Where a servant is employed by his master to act for him in a single transaction, he must be regarded as the special agent of his master; and, in such case, it is incumbent upon every one dealing with him, who wishes to charge his master upon his contracts, to inquire into the extent of his authority, as, should he exceed it, his master will not be bound.

And, therefore, where (a) the plaintiff sent his servant to receive £60 from B., and B. desired E., who owed him money, to strike off £60 from his debt and pay the plaintiff's servant; and E. accordingly credited himself with £60 in account with B., but instead of giving the plaintiff's servant money gave him a goldsmith's note, which the servant accepted as payment: it was held that the plaintiff was not bound by the act of the servant in receiving the note instead of money.

Again (b), the defendant drew a cheque in favour of a creditor, and gave it to his own farm bailiff (who bought and sold cattle for him) with instructions to deliver it to the creditor in whose favour it was drawn, but the bailiff, at the request of the creditor, got it discounted by the plaintiff (a banker at some distance), and gave the money to the creditor; some days afterwards the bankers on whom the cheque was drawn failed, and the plaintiff having omitted to present the cheque to them, brought an action against the defendant for the amount; but Alexander, C.B., was of opinion that the defendant was not bound by the act of his farm bailiff, who had no authority to act as he had done.

And where the defendant directed a telegraph clerk to telegraph for "three" rifles, and by mistake he telegraphed for "the" rifles, and plaintiff sent fifty, the defendant was only held liable to pay for three, as the telegraph clerk was only the defendant's agent to transmit the message actually given for transmission (c).

So, if the owner of a horse send a stranger to a fair, with express directions not to warrant the horse, and the latter act contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was a special agent, and was not acting within the scope of his authority (d).

And where a person dealing with an agent has notice, either from

(a) *Ward v. Evans*, 2 Lord Raym. 928.

(b) *Waters v. Brogden*, 1 Y. & J. 457.

(c) *Henkel v. Pape*, L. R. 6 Ex. 7.

(d) *Fenn v. Harrison*, 3 T. R. 757, per Ashurst, J., at p. 761; see Paley on Ag. 202. But see per Erle, C.J., in *Brady v. Todd*, 9 C. B. (N. S.) 604.

the mode in which the authority is exercised, or it would seem in any other manner, that the agent is acting under a special authority, he is, *à fortiori*, bound to inquire whether or not the authority has been properly followed; and if he do not make such inquiries, and it turn out that the party exceeded his authority, he must suffer for his temerity (e).

Thus "a signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority" (f). A person, therefore, who takes a bill or note so accepted or endorsed, is bound at his peril to inquire into the extent of the agent's authority (g).

If, upon inquiry into the authority of such an agent, it should turn out that he is acting under a written authority, parties dealing with him should call for the production of the authority; for, should the agent exceed his authority, his principal will not be bound (h). This rule indeed applies equally to the case of a general agent.

If, however, the act assumed to be done is within the authority given (in ascertaining which the authority must be strictly construed) (i), the principal will be bound, although the act done may be in violation of private instructions as to the mode of executing the authority. With such instructions third parties have nothing to do (k). It is therefore important to bear in mind the distinction between the two, although it is not in all cases easy to distinguish the one from the other.

As a general rule, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person, but this maxim merely imports that inasmuch as confidence in the particular person employed is at the root of the contract of agency, the authority to delegate powers to another cannot be implied as an ordinary incident in the contract. But an authority to constitute in the interests of the principal a direct privity of contract between him and a substitute for the agent may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that authority should

(e) *Jordan v. Norton*, 4 M. & W. 155; *Neale v. Turton*, 4 Bing. 149.

(f) The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25.

(g) *Alexander v. Mackenzie*, 6 C. B. 766; *Stagg v. Elliott*, 31 L. J. C. P. 260; *Bryant, Powis and Bryant, Ltd. v. La Banque du Peuple*, [1893] A. C. 170.

(h) *Attwood v. Munnings*, 7 B. & C. 278; *Story on Ag.*, s. 72; and see the American case of *North River Bank v. Aymar*, 3 Hill R. 262, there quoted. See also *Balfour v. Ernest*, 28 L. J. C. P. 170, *et cas. ibid. cit.*

(i) *Ante*, p. 175.

(k) *Story on Ag.*, 73; *Smethurst v. Taylor*, 12 M. & W. 545.

exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute (l).

The employment of workmen or servants to do an act is not necessarily a violation of the rule *delegatus non potest delegare*. Thus, for instance, where a merchant receives goods from abroad for sale, and he deposes his foreman to go to the proper place for selling such goods, and the foreman sells them accordingly, in that case it would be impossible for the consignor to say that the sale was void because the merchant did not personally sell them himself, but employed another person for that purpose, by whom the sale was effected. The merchant would no doubt be answerable for all the acts of his foreman, but provided such acts were proper and within the scope of his authority they would be the acts of the merchant himself. And therefore where a proposal for a life policy was accepted on behalf of a life assurance company by their agent in Australia, who acted in the transaction through the medium of sub-agents, and the premium was paid, it was held binding on the company though the agent had no authority to appoint sub-agents, and there were some informalities, but of form only (m).

But where a master has not either expressly, or by implication, from a course of dealing, authorised his servant to pledge his credit, his servant cannot, by so doing, render him liable to pay for goods so obtained.

Thus (n), where the defendant contracted with the plaintiff to serve him with meat at a certain price for ready money, and the cook was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it, generally on Monday morning, and the defendant always gave her money to pay; which course of dealing continued for a long time, till at last the defendant got a cook who embezzled the money; it was held that the defendant was not liable, and Lord Kenyon, C.J., said, "Nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit."

And so where (o) the defendant dealt with the plaintiff for the porter used in his family, and was in the habit of paying ready money

(l) *De Bussche v. Alt*, 8 Ch. D. 286; *Powell v. Evan Jones & Co.*, [1905] 1 K. B. 11. See *Gwilliam v. Twist*, [1895] 2 Q. B. 84, where a question was raised how far the driver of an omnibus, who was incapacitated from driving, had authority to employ another person to drive the omnibus home, so as to render his master liable for the acts of the person so employed.

(m) *Rosster v. Trafalgar Life Assurance Association*, 27 Beav. 377.

(n) *Stubbing v. Heintz, Peake*, 47; and see per Lord Abinger, C.B., in *Fleming v. Hector*, 2 M. & W. 181.

(o) *Pearce v. Rogers*, 3 Esp. 214.

to the plaintiff for a certain quantity which was allowed for the family, but the maid-servant obtained some clandestinely for her own use, and that of the defendant's wife's mother, but it did not appear that the plaintiff knew of this circumstance, it was held that the defendant was not liable; Lord Eldon saying, that "to allow such a demand would be to put it in the power of servants and tradesmen to ruin the master."

Again, where (p) a butler ordered brandy in his master's name, and the brandy was consumed by the butler and cook, without the master being privy to the order, delivery or consumption, the master was held not liable to pay for it.

And where (q) a lady ordered of a tailor two suits of livery a year for her coachman, and the tailor supplied one; but, at the desire of the coachman, supplied plain clothes instead of the other, it was held that the lady was only liable to pay for the livery actually supplied, and was entitled to set off against a subsequent account for clothes the price of a suit of livery which had been supplied and paid for, but taken back by the tailor from the coachman.

Upon similar principles where (r) a servant, having injured his master's chaise by careless driving, left it with a coachmaker to be repaired without acquainting his master, and without any orders from him, and it appeared that the master had never employed the coachmaker, who refused to deliver up the chaise without payment of his bill for the repairs, the master having brought an action for the chaise, recovered; as it was held that the coachmaker, not having inquired of the master whether the order for repairs was given by his authority, had no claim against him for the amount of his bill. And an ordinary coachman or groom has no ostensible authority, implied from his employment, to pledge his master's credit for forage supplied to his master's horses. The defendant (s), under an arrangement with his coachman, paid him in addition to his wages a fixed weekly sum for each horse, in return for which the coachman undertook to pay for forage and shoeing. The plaintiff, a corn merchant, relying entirely on statements made to him by the defendant's coachman, supplied

(p) *Maunder v. Conyers*, 2 Stark, 281.

(q) *Hunter v. Countess Dowager of Berkeley*, 7 C. & P. 413.

(r) *Hiscox v. Greenwood*, 4 Esp. 174.

(s) *Wright v. Glyn*, [1902] 1 K. B. 745. In *Precious v. Abel*, 1 Esp. 350, a master who by arrangement with his groom paid him five guineas a year, for which the groom was to keep the horses shod, was held liable to pay a farrier, who did not know of this arrangement, his bill for shoeing the horses; and in *Rimell v. Sampayo*, 1 C. & P. 254, where a master contracted with his coachman to provide horses and livery for £220 a year, Littledale, J. said that he thought that "by the master's sending his coachman forth into the world, wearing his livery, to hire horses which he (the master) afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire." But these two cases must be taken to have been decided on special facts: per Collins, M.R., in *Wright v. Glyn*, *supra*.

forage for the defendant's horses, the defendant being unaware from whom his coachman had ordered the forage, or that it had not been paid for. The Court held that there was no evidence of any ostensible authority acted on by the plaintiff or of ratification by the defendant, and that therefore the defendant was not liable to pay for the forage supplied by the plaintiff.

So, if a servant be left in charge of children with a sufficient allowance for their support, he is not a general agent with power to pledge his master's credit for necessities or goods supplied for the support of the children (*t*).

The borrowing of money is not within the ordinary authority of an agent, whose authority is to be measured by the ordinary necessities of the business in which he is employed, and not by sudden and extraordinary occasions (*u*).

The bailiff of a large farming establishment, through whose hands all payments and receipts take place, has no implied authority to pledge the credit of his employer by drawing and endorsing bills in his name (*x*). Nor has the manager of a discount company authority to purchase shares (*y*). Nor has the secretary of a company authority to make representations to induce people to buy shares in it (*z*). And the secretary of a company who has authority only to accept bills drawn by A. on the company, cannot bind the directors by accepting bills drawn by B (*a*).

Nor has the country agent of an insurance company authority to receive payment of premiums after the usual fifteen days' grace (*b*). Nor has the agent of an insurance company power to bind the company by issuing policies contrary to the deed of settlement (*c*).

(*t*) *Atkyns v. Pearce*, 26 L. J. C. P. 252, per Cockburn, C.J.

(*u*) *Hawtayne v. Bourne*, 7 M. & W. 595, a case of a resident engineer of a mining company. In *Re Cunningham & Co., Simpson's Claim*, 36 Ch. D. 532, the manager of a company was held not to have authority to bind the company by signing a promissory note which was unnecessary and not in the ordinary course of the company's business. In *Montaignac v. Shitta*, 15 App. Cas. 357, it was admitted that the power of administering a certain business which had been given to an agent conferred on him authority to raise money, if it was necessary, for the proper carrying on of the affairs to be administered by him. In *Jacobs v. Morris*, [1902] 1 Ch. 816, where a power of attorney to an agent enabling him to conduct a certain business contained no express power to borrow, the Court refused to infer any such power, as it was not essential to the agent's conduct of the business.

(*x*) *Davidson v. Stanley*, 2 M. & G. 721; see *Waters v. Brogden*, 1 Y. & J. 457.

(*y*) *Cartmell's Case*, L. R. 9 Ch. 691; 43 L. J. Ch. 588.

(*z*) *Newlands v. National Employers' Accident Association*, 54 L. J. Q. B. 428. In *Barnett v. South London Tramways Co.*, 18 Q. B. D. 815, Lord Esher, M.R., said that the secretary to a company is a mere servant, who has to do what he is told, and no person can assume that he has any authority to represent anything at all. His functions are *prima facie* clerical and ministerial only: *Tendring Hundred Waterworks Co. v. Jones*, [1903] 2 Ch. 615.

(*a*) *Neale v. Turtton*, 4 Bing. 149. Where a traveller took a bill in his own name and absconded, it was held not to be payment to his employer: *Hogarth v. Wherley*, L. R. 10 C. P. 630.

(*b*) *Accey v. Fernie*, 7 M. & W. 151; approved in *London and Lancashire Life Assurance Co. v. Fleming*, [1897] A. C. 499.

(*c*) *Hambro v. Hull and London Fire Insurance Co.*, 3 H. & N. 789.

Upon similar principles in an American case (*d*) in which the cashier of a bank wrote to the secretary of the treasury saying that the bearer was authorised to contract for the transfer of money from New York to New Orleans, and such a transaction was not within the scope of the powers of the cashier, nor authorised by the directors, it was held that the bank was not bound to reimburse the money which the secretary of the treasury advanced. And in another case (*e*) it was held that a release given by the president and cashier of a bank to the indorser of a promissory note of his liability upon it, did not bind the bank: neither one nor both having authority to make contracts of that kind.

Nor can a master be rendered liable upon a contract made by his servant, if at the time the contract is entered into, the party with whom it is made knows not only that the servant is only an agent, but also who his master or principal is (*f*); and notwithstanding that knowledge choose to make the servant his debtor, dealing with him and him alone. In that case the party cannot, on the failure of the servant to perform the contract, turn round and charge his master, having once made his election (*g*) at the time when he had the power of choosing between the one and the other (*h*).

And a master who has been in the habit of paying for goods ordered by his servant, and has thus impliedly given him authority to pledge his credit, may, by giving notice to the tradesman who has supplied the goods on those terms, revoke or terminate the servant's authority to pledge his master's credit, provided such notice is given before the authority is acted on (*i*).

Where (*k*), however, the defendant had been in the habit of dealing with the plaintiff for beer on credit, but once, when he paid the bill, told the plaintiff's servant who brought the beer that he would run up no more bills with the plaintiff, but would pay for the beer as it came in, and afterwards gave the servant money to pay for the beer, but the servant embezzled it, the defendant was held liable, as he

(*d*) *United States v. City Bank of Columbus*, 21 How. 356. But the cashier of a bank has authority to judge of genuineness of orders for payment of money, and to pay them: *R. v. Prince*, L. R. 1 C. C. R. 150. Therefore obtaining cash from him by a forged order is obtaining money by false pretences, and not larceny, *ibid*. See *R. v. Middleton*, L. R. 2 C. C. R. 38, where a clerk in the post-office, by mistake, handed to the prisoner £8 16s. 10d. (on his presenting an order for 10s.), and he took the money *animo furandi*, and was held rightly convicted of larceny.

(*e*) *Bank of United States v. Dunn*, 6 Peters, 51.

(*f*) If the party know the servant to be merely an agent, but do not know who his principal is, and debit the servant; he may, in that case, charge the principal when discovered: *Thomson v. Davenport*, 2 Sm. L. C. 379; 9 B. & C. 78; *Thomas v. Edwards*, 2 M. & W. 215.

(*g*) As to what amounts to an election, and whether anything short of suing to judgment amounts to an election, see *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Priestley v. Fernie*, 3 H. & C. 977, and other cases, *ibid*. cit.

(*h*) See per Lord Tenterden in *Thomson v. Davenport*, 2 Sm. L. C. 379, 9 B. & C. 86, and the converse case of *Ramazotti v. Bowring*, 29 L. J. C. P. 30.

(*i*) *Chappell v. Bray*, 30 L. J. Ex. 24.

(*k*) *Gratland v. Freeman*, 3 Esp. 85.

did not show that the plaintiff himself had notice of this change in the mode of dealing.

And it is clear that mere notice to the servant himself, who had general authority to make contracts in his master's name, would not exonerate the master from liability upon contracts made by the servant after his discharge (l).

Thus, in a case (m) where a servant had power to draw bills of exchange in his master's name, and afterwards was turned out of the service, Holt, C.J., said: "If he draw a bill in so little time after that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master."

The case of *Monk v. Clayton* (n), "where the act of a servant, though out of place, bound his master by reason of the former credit given him by his master's service, the other not knowing that he was discharged," is one of a similar kind.

The master's death operates as a revocation of the servant's authority to pledge his credit; after that event, therefore, the master's representatives would not be bound by the servant's contracts (o).

Lapse of time, also, would, it is conceived, in many cases raise a presumption that the servant's authority to pledge his master's credit was terminated (p).

There is no implied warranty by an employer that his servants will not, after leaving his employment, improperly disclose information acquired by them in his service. So if a person who, for example, employs a private enquiry agent, wishes to protect himself against breaches of confidence by the agent's servants, he should expressly stipulate to that effect (q).

In cases of Tort—Criminaliter.

A master is not, generally speaking, criminally responsible for the acts of his servants, unless he expressly command or personally co-operate in them. In criminal cases they must each answer for their own acts, and stand or fall by their own behaviour (r). So a

(l) *Trueman v. Loder*, 11 A. & E. 589; *Aste v. Montague*, 1 Fost. & F. 264. See *Tassell v. Cooper*, 9 C. B. 509, where the question arose whether a farm bailiff, who had orders to deal no more with his master's property, was justified in receiving money for wheat sold previously.

(m) — *v. Harrison*, 12 Mod. 346.

(n) Cited by the Court in *Nickson v. Brohan*, 10 Mod. 110.

(o) *Blades v. Free*, 9 B. & C. 167; but see Brett, L.J., in *Drew v. Nunn*, 4 Q. B. Div. 661, in which the defendant was held liable to pay for goods ordered by his wife and supplied by the plaintiff during the defendant's temporary insanity.

(p) — *v. Harrison*, 12 Mod. 346.

(q) *Easton v. Hitchcock*, [1912] 1 K. B. 535.

(r) *R. v. Huggins*, 2 Str. 882; Paley on Ag. 303; Story on Ag. s. 452.

sheriff is not liable *criminaliter*, though he is *civiliter*, for the wrongful act of his bailiff (s). And where one employs another to do a thing, and there are several ways of doing it, one criminal and another innocent, and he does it in a criminal manner, the employer is not responsible (t).

But where one man expressly orders another to do an illegal act, it is clear that the employer at least is accountable for that act (u). Whether or not the person employed is also criminally responsible must depend upon circumstances (x).

If, though the actual doer of the deed be a servant, the master stands by and sees and assents to the committal of the offence by the servant or chooses to refrain from exercising the authority which he might have exercised to prevent the offence being committed, the master would be criminally liable; as (y) where the manager of a coal mine was held responsible for a breach by his servant, a banksman, of a statutory rule in lowering more than eight people at once, the master standing by and not forbidding it. So, too, a master was held liable for knowingly suffering prostitutes to meet and remain in his house contrary to 2 & 3 Vict. c. 47, s. 44, if he intended his servant, who was the actual offender, to do the act which amounted to a misdemeanour by managing the house in the way complained of; though the mere fact of the relation of master and servant existing between them would not have made him liable (z).

If a man employs an innocent agent (a) for the purpose of committing any crime, the employer is the principal offender, and liable to be indicted and punished as such, although he be absent when the crime is actually committed; and an accessory before the fact to a felony may be indicted, tried, convicted and punished in all respects as if he were a principal (b). This principle is constantly acted upon in the administration of criminal law.

So, where two dock porters stole a quantity of molasses, and by direction of H., a dealer in that article, took it to his warehouse and

(s) *Laicock's Case*, Latch. 187; *Sanderson v. Baker*, 3 Wils. 310, 316; *Woodgate v. Knatchbull*, 2 T. R. 148; *Bagge v. Whitehead*, [1892] 2 Q. B. 355.

(t) *Peachy v. Rowland*, 13 C. B. 182; and per Lord Wensleydale in *Cooper v. Slade*, 6 H. L. C. 746, *post*, p. 200.

(u) *Fost.* 125, *Roberts v. Woodward*, 25 Q. B. D. 412. Upon this principle it was held that the conviction of a servant for using water, unappealed against, was evidence against his master that he had no right to use it so: *Eaton v. Swansea Waterworks*, 17 Q. B. 267.

(x) As to the criminal liability of a servant for acts done at the command of his master, see *post*, p. 266. In *R. v. Woodburn and Coke*, 17 How. St. Tr. 54, W., a hired labourer, and C., his master, were tried, condemned, and executed under the Coventry Act. (22 & 23 Car. II. c. 1) for slitting a man's nose.

(y) *Howells v. Wynne*, 32 L. J. M. C. 241.

(z) *Wilson v. Stewart*, 32 L. J. M. C. 198.

(a) An agent, or servant, concurring in a crime for the purpose of aiding in the detection of his employer, is looked upon as an innocent agent: *R. v. Bannen*, 1 C. & K. 295.

(b) 24 & 25 Vict. c. 94, s. 1; and see sect. 6.

left it with M., who was H.'s servant, and who knew it to be stolen: it was held that both the dealer and his servant might be convicted of receiving stolen goods, although the dealer was absent at the time the molasses was left at his warehouse, but it was clear that shortly after he came home he was aware of the molasses having been left, and there was strong ground for supposing that he then knew that it had been stolen (c).

Upon similar principles, an accessory after the fact to a felony may be convicted with the principal felon or as for a substantive felony (d).

Again, where (e) the lessee of a coal-mine had, from the shaft opened to work it, carried on extensive workings of coal, and by means of these workings had gotten coal belonging to about forty different proprietors, without their sanction or knowledge, and had thus unlawfully possessed himself of £10,000 worth of the coal of other persons (the evidence extended to the getting of coal continuously during a period of upwards of four years, and to operations conducted by different underlookers and by many different workmen); but it did not appear that the lessee had himself personally touched or removed any of the coal; he was nevertheless convicted of stealing it (f): Erle, J., observing, "The prisoner did not by his own hand pick or remove the coal; but if a man does, by means of an innocent agent, an act which amounts to a felony, the employer and not the innocent agent is the person accountable for that act."

But where a master was engaged in making fireworks illegally (*i.e.*, contrary to a now-repealed statute, 9 & 10 Will. III. c. 7, s. 1), some of which, in his absence, by an intervening negligent act of his servant, exploded, and a rocket flew across the street, set fire to a house, and burnt one of the inmates to death, it was held that the master could not be convicted of manslaughter, as it was the superadded negligence of someone else that caused the death (g).

There are, moreover, cases in which the act of the servant, having been within the usual scope of his employment, has been considered to have been done by the implied command of the master, and he has been held criminally responsible for it, although he may, in the particular instance, have been perfectly ignorant of the doing it. Thus, before 1843, the publishers and proprietors of newspapers and other publications were frequently held liable to criminal informations for libels published by their servants in the usual course of their employment, although such publishers and proprietors personally had nothing to do with the publication of the libels (h).

(c) *R. v. Parr*, 2 Mood. & Rob. 346.

(d) 24 & 25 Vict. c. 94, s. 3; and see *R. v. Jarvis*, 2 Mood. & Rob. 40.

(e) *R. v. Bleasdale*, 2 C. & K. 765.

(f) Under 7 & 8 Geo. IV. c. 29, s. 37, since repealed.

(g) *R. v. Bennett*, 28 L. J. M. C. 27.

(h) See May's Const. Hist. vol. 2, 107.

To remedy this state of the law, the Libel Act, 1843 (6 & 7 Vict. c. 96), was passed, which provides:

“ Sect. 7. That whensoever upon the trial of any indictment on information for the publication of a libel under the plea of not guilty evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.”

Since the passing of this statute, it has been held that the general authority given to an editor of a newspaper to use his discretion in the insertion of articles is not of itself sufficient to make proprietors criminally responsible for libellous articles inserted by the editor without their knowledge, and without any specific authority or consent from them (*i*).

Again, in the following case, a man was held liable to an action for penalties through the act of one who was considered his agent (*k*).

An election was about to take place at C.; S. was one of the candidates, and in his committee-room the question was discussed whether paying the expenses of bringing up out-voters was legal. S., after referring to a law-book, said it was, but limited it to the payment of expenses out of pocket. A circular had been previously prepared and printed, requesting out-voters to come up and vote for S. Upon S. making this declaration of his opinion, a clerk to an agent of S. (without any express direction from S. or from the agent) wrote at the bottom of each circular, “ Your railway expenses will be paid.” A voter who resided at H. received one of the circulars with this added note; he came to C. and voted for S., and afterwards received 8s., the expenses to which he had *bonâ fide* been put by his journey. It was held by the House of Lords, that the words added to the circular must be treated as written by authority of S., and that he was, therefore, liable to the penalties attached to bribery under the Corrupt Practices Prevention Act, 1854 (*l*). In giving judgment, Lord Wensleydale said (*m*): “ I take the law to be clear, that a man cannot be guilty by his agent of an illegal act, and be held responsible for that act, unless he has given the agent authority, express or implied, to do that illegal act. I know that the law of agency in such cases has been much extended by committees of the House of Commons, but I take it to be a clear proposition of law, that if a man employs an agent

(*i*) *R. v. Holbrook*, 3 Q. B. Div. 60; and *S.C.* after second trial, 4 Q. B. D. 42.

(*k*) *Cooper v. Slade*, 6 H. L. Cas. 746.

(*l*) 17 & 18 Vict. c. 102. See now the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), as to illegal employment at elections, and as to expenditure by unauthorised persons, the Representation of the People Act, 1918 (7 & 8 Geo. V. c. 64), s. 34.

(*m*) At p. 793.

for a perfectly legal purpose, and that agent does an illegal act, that act does not affect the principal unless a great deal more is shown, unless it is shown that the principal directed the agent so to act, or really meant he should so act, or afterwards ratified the illegal act, or that he appointed one to be his general agent to do both legal and illegal acts, to do everything in short which he might think proper to support the interests of the candidate. If the candidate gives his agent such a general authority, and the agent is guilty of bribery, the candidate is no doubt responsible for it. I know that there is a very great difference in parliamentary practice upon this subject, but I conceive that the rule of law is as I have laid it down, that no man who is an agent for a legal purpose can make the principal responsible for an illegal act, unless the principal has in some way, directly or indirectly, authorised it, as I have explained."

So, also, masters have been frequently held liable to informations for penalties incurred by the breach of some statutory regulations by persons in their employ, although the masters themselves may have been perfectly ignorant that in the particular instance any breach of the law has been committed (*n*). These informations, it is true, do, in strictness, partake more of the nature of civil proceedings to recover that which is a debt to the Crown, than of a criminal proceeding, but still they are penal proceedings. Perhaps the most familiar instances of the master's liability to this kind of proceedings are to be found in cases of informations for breach of the revenue laws, in which cases, if a master were not held responsible for the acts of his servants, the revenue laws might, as was once (*o*) observed by Pollock, C.B., "be evaded with the utmost facility and impunity, and they would be reduced to a mere dead letter."

So, where (*p*) an excise officer discovered on the defendant's premises a quantity of tobacco, for which he requested to see the permit, and the defendant's servant said he had one, when in fact there was none, and ultimately produced a permit for the removal of different tobacco, and dated after the discovery by the officer, the defendant was held liable to an information for penalties for harbouring and concealing tobacco without paying duty, although at the time of the discovery he was from home, and had been absent for some time previously. In giving judgment, Bayley, B., said: "This is a case in which, to my mind, the act of the servant is to be considered as being an act done in the master's business, and within the scope of the authority probably given by the master to the servant. . . . This is the case of a servant of a fraudulent master endeavouring

(*n*) *Attorney-General v. Siddon*, 1 Cr. & J. 226; *Attorney-General v. Carlton Bank*, [1899] 2 Q. B. 158.

(*o*) *Attorney-General v. Allen*, Exc. Mich. Term, 1850.

(*p*) *Attorney-General v. Siddon*, 1 Cr. & J. 220; *Attorney-General v. Riddle*, 2 Cr. & J. 493.

by his own act to conceal his master's fraud, and to prevent the consequences which would otherwise fall upon the master in respect of that fraud. From the nature of the service in which the party is employed, and from the conduct of the master in his fraud, you may infer whether or no the servant had *primâ facie* an authority from the master; not perhaps specifically for the doing of this specific act, but for the purpose of doing that which, in the exercise of his discretion upon a moment of embarrassment, which the possession of an improper article might naturally create, the servant should think and deem to be best."

The learned baron then went through the facts of the case, which, in his opinion, formed *primâ facie* evidence to show that the act of the servant was the act of the master, though, said he, "The master was certainly at liberty to have produced evidence for the purpose of rebutting that *primâ facie* case, but, in the absence of any evidence to rebut that case, it was rightly left to the jury, and the jury were bound to consider it as being the master's act."

There is a general presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, or some blameworthy condition of mind, is an essential ingredient in every offence (q).

The principal class of exceptions from this rule is that which consists of cases where, in the public interest, penalties have been imposed by statute upon the doing of certain acts. To what extent a criminal liability is imposed upon a master for the acts of a servant done without the express authority of the master must depend upon the language used in the statute which defines the offence.

Under the Licensing Act, 1872 (35 & 36 Vict. c. 94), it was held that a licensed victualler was liable to be convicted under sect. 16 for supplying liquor to a constable on duty, though this was done by his servant without his knowledge (r). Sect. 75 of the Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V c. 24) makes it an offence for a licensed person to "permit drunkenness" on his premises; and it is provided by the same section that where a licensed person "is charged with permitting drunkenness on his premises, . . . and it is proved that any person was drunk on his premises, it shall lie on the holder of the licence to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises."

Under the now repealed section 13 of the Licensing Act, 1872, making the sale of intoxicating liquor to a drunken person an offence, a licensed victualler was held liable (s), for the act of his servant, though the servant had acted contrary to express orders in selling to a

(q) *Sherras v. De Rutzen*, [1895] 1 Q. B. 918; *Coppen v. Moore*, [1898] 2 Q. B. 306; *Chisholm v. Doulton*, 22 Q. B. D. 736.

(r) *Mullins v. Collins*, L. R. 9 Q. B. 292.

(s) *Commissioners of Police v. Cartman*, [1896] 1 Q. B. 655.

drunken person, the act being one within the scope of the servant's employment; but the committee of a club was held (t) not to be liable for selling intoxicating liquors without a licence in a case where the steward of the club, whose orders were to sell only to members of the club, contrary to his orders sold to persons who were not members.

Section 79 of the Licensing (Consolidation) Act, 1910 (10 *Edw. VII.* & 1 *Geo. V. c. 24*), also imposes a penalty upon any person licensed under the Act who "suffers" any gaming or unlawful game to be carried on on his premises. To make a licensed person liable under this section, if neither personal knowledge on his part (u) nor connivance (x) is shown it will be sufficient if the gaming had been allowed by the servant whom the master had left in charge of the premises (y), so that the servant's permission of the gaming had been an act done in the course of his employment, even though contrary to his master's express orders. But where a drayman, without his master's authority and contrary to his express orders, sold beer to persons in the street who had not previously ordered it, it was held that there was not a sale by the master contrary to sect. 3 of the Licensing Act, 1872 (35 & 36 *Vict. c. 94*), which prohibits the sale of intoxicants at any place where he is not authorized by his licence to sell the same. It was not a case of delegated authority; and it was not within the general scope of the drayman's employment to sell beer (z).

The Licensing (Consolidation) Act, 1910, further subjects to penalties, by sect. 68, every holder of a licence who "knowingly" sells or delivers or allows any person to sell or deliver intoxicating liquors to persons under the age of fourteen except under certain restrictions. Under this section, a licensee is not liable to penalties where his servant, contrary to express orders, sells intoxicating liquors to a child in contravention of the provisions of the statute, the licensee himself being in charge of the premises, without any delegation of authority to his servant (a).

Under other Acts also masters have been held criminally responsible for the acts done by their servants in the course of their employment, although contrary to express orders; as under the Merchandise Marks Act, 1887 (50 & 51 *Vict. c. 28*) (b); and under the Slaughter Houses (Metropolis) Act, 1874 (37 & 38 *Vict. c. 67*) (c). And an innocent

(t) *Newman v. Jones*, 17 Q. B. D. 132.

(u) *Somerset v. Wade*, [1894] 1 Q. B. 574.

(x) *Bosley v. Davies*, 1 Q. B. D. 84.

(y) *Redgate v. Haynes*, 1 Q. B. D. 89; *Bond v. Evans*, 21 Q. B. D. 249. But in *Somerset v. Hart*, 12 Q. B. D. 360, knowledge of a potman who was not put in charge of the premises was held to be not sufficient.

(z) *Boyle v. Smith*, [1906] 1 K. B. 482. See now Licensing (Consolidation) Act, 1910, *supra*, s. 65.

(a) *Emary v. Nolloth*, [1903] 2 K. B. 264

(b) *Coppen v. Moore*, [1898] 2 Q. B. 306; see *Budd v. Lucas*, [1891] 1 Q. B. 408.

(c) *Collman v. Mills*, [1897] 1 Q. B. 396.

vendor of milk is liable to a penalty under sect. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c. 63*), for the unauthorised act of his servant in adulterating it (*d*).

Where under a local Act a penalty was imposed for a breach of a regulation that every engine running on a tramway at night should carry a lighted lamp in front, a tramway company was held responsible for the personal neglect of their engine driver in driving an engine at night without seeing that the lamp in front of his engine was lighted (*e*).

The Smoke Nuisance (Metropolis) Act, 1853 (16 & 17 *Vict. c. 128*), imposed a penalty by sect. 1 on any person who should "negligently" use a furnace so that the smoke arising therefrom should not be effectually consumed. Under this enactment it was held (*f*) that a master who was not guilty of any personal negligence was not responsible for the negligence of his servant. The use in a penal statute of this sort of the word "neglect" or "default" implies the necessity of some personal neglect or default on the part of the person accused (*g*). On the other hand, where a statute provided that: "Every furnace . . . shall be constructed . . . upon the principle of consuming and so as to consume or burn the smoke. . . . If any person uses or suffers to be used any such furnace which shall not be constructed upon the principle of consuming so as to consume or burn its own smoke, or if any person using or permitting to be used any furnace so constructed shall, in the event of the smoke . . . not being consumed . . . fail to show that such furnace has not been negligently used," he shall be liable to a penalty; it was held that the owner could not be excluded from liability. He could only escape by showing that there was no negligence on the part of himself or anybody else (*h*).

And an employer has been held liable to penalties for breach of the Truck Act, 1831, by his bookkeeper paying wages otherwise than in current coin of the realm (*i*).

By the Pawnbrokers Act, 1872 (35 & 36 *Vict. c. 93*), penalties are imposed on pawnbrokers in certain cases, and it is enacted—

"Sect. 8. For the purposes of this Act, anything done or omitted by the servant, apprentice, or agent of a pawnbroker in the course of or in relation to the business of the pawnbroker, shall be deemed to be done or omitted (as the case may be) by the pawn-

(*d*) *Brown v. Foot*, 66 L. T. 649; *Parker v. Alder*, [1899] 1 Q. B. 20; see also *Buckingham v. Duck*, 88 L. J. K. B. 375 (Milk (Prices) Order, 1917); *Warrington v. Windhill Industrial Co-operative Society*, 118 L. T. 505 (Food (Conditions of Sale) Order, 1917); *Betts v. Armstead*, 20 Q. B. D. 771. Compare *Anglo-American Oil Co., Ltd. v. Manning*, [1908] 1 K. B. 536 (Weights and Measures Act, 1878); *Phelon & Moore, Ltd. v. Keel*, [1914] 3 K. B. 165 (Motor Car Act, 1903).

(*e*) *St. Helens District Tramway Co. v. Wood*, 60 L. J. M. C. 141.

(*f*) *Chisholm v. Doulton*, 22 Q. B. D. 736. The Smoke Nuisance (Metropolis) Act, 1853, was repealed by the Public Health (London) Act, 1891 (54 & 55 *Vict. c. 76*), and sects. 23 and 24 of that Act contain provisions for smoke consumption.

(*g*) *Dickenson v. Fletcher*, L. R. 9 C. P. 1.

(*h*) *Armitage, Ltd. v. Nicholson*, 108 L. T. 993.

(*i*) *Smith v. Walton*, 3 C. P. D. 109.

broker; and anything by this Act authorised to be done by a pawnbroker may be done by his servant, apprentice, or agent."

A master, however, could not be thus rendered liable to penalties for any act of his servant beyond the scope of his authority (*k*).

And where a servant in charge of a steam threshing-machine let on hire to his master erected it within twenty-five yards from a carriage-way, but there was no evidence that the master ordered it to be so erected, it was held, by the Court of Queen's Bench, that the master could not be convicted under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 70, which imposes a penalty upon any person who shall erect or cause to be erected any steam-engine, &c., within the distance of twenty-five yards from any carriage-way (*l*).

Another class of cases which forms an exception to the general rule that *mens rea* is essential to the commission of an offence is that in which masters have been held liable for public nuisances (*m*), such as carrying on offensive trades, committed by their servants, although they themselves have nothing to do personally with the nuisance complained of. In such cases, also, if a master could shield himself from criminal responsibility on the ground that he personally had nothing to do with the carrying on the trade, the real offender might escape with impunity, and the public grievance remain unredressed. It has indeed scarcely ever been contended that the master, in such cases, was not guilty on the ground that the nuisance was perpetrated through the agency of others (*n*), and where that objection has been taken, it has been speedily overruled.

Thus in *Rex v. Medley* (*o*), the chairman, deputy chairman, and other directors of a gas company, and several persons employed by them in carrying on the works, were jointly indicted for a nuisance occasioned by conveying the refuse of the gas, &c., into the river Thames, whereby fish were destroyed, and the water rendered unfit to drink. On the part of the defendants it was contended that the directors of the company were not liable, as no criminal participation on their part, in the acts done by their workmen, was shown, and they did not even know what was done. But they were found

(*k*) *Olding v. Smith*, 16 Jur. 497; *R. v. Gilroy*, 4 Ct. Sess. Cas., 3rd series, 656 (retailing beer without a licence).

(*l*) *Harrison v. Leaper*, 5 L. T. 640. See *Hearne v. Garton*, 2 E. & E. 66.

(*m*) In *Turberville v. Stampe*, 1 Lord Raym. 264, Holt, C.J., said: "If my servant throws dirt in the highway, I am indictable." See 1 Bl. Comm. 431; 2 Noy's Maxims, c. 44; *Hall's Case*, 1 Mod. 76; *R. v. Cross*, 3 Camp. 224.

(*n*) *R. v. Pedly*, 1 A. & E. 822, where a landlord was held liable to be indicted for a nuisance committed by his tenants, such nuisance being the inevitable result of the occupation, and the landlord receiving rent for that occupation. See, however, *Rich v. Basterfield*, 4 C. B. 783, 799.

(*o*) 6 C. & P. 292. See also *R. v. Stephens*, L. R. 1 Q. B. 702, where a master was held liable to indictment for obstructing the river, although he specially ordered his servants not to do it; and *Mitchell v. Brown*, 1 E. & E. 267; *Searle v. Reynolds*, 7 B. & S. 704; and *Barnes v. Akroyd*, L. R. 7 Q. B. 474, where the owner of a factory was held responsible for black smoke issuing from a chimney in his factory.

guilty and fined, Lord Denman, C.J., saying it made no difference that the directors were ignorant of what had been done, provided they gave authority to the manager to conduct the works. "It is to me both common sense and law, that if persons for the advantage employ servants to conduct works, they must be answerable for what is done by those servants."

And again, where a railway company (p) was indicted for obstructing a highway by works performed in a manner not conformable to the powers conferred by the Act of Parliament and one of the grounds on which it was argued that the company was not liable to an indictment for a misfeasance committed by its servants was that the individuals doing the act might be individually punished, Lord Denman said: "We are told that this remedy is required because the individuals who concur in voting the order or in executing the work, may be made answerable for it by civil proceedings. Of this there is no doubt. But the public interest is nothing of the former, and the latter, if they can be identified as commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual measure deterring from an oppressive exercise of power for the purpose except the remedy by indictment against those who truly do it—that is, the corporation acting by its majority; and there is the principle which places them beyond the reach of the law for civil proceedings."

Upon similar principles it is conceived that an innkeeper may be rendered liable to an indictment for an unjustifiable refusal to receive a guest into the inn, if it were within the scope of the servant's employment to receive guests (q); or a tenant who has reserved the game might be proceeded against under the Game Act, 1831 (r) if he employed another person to kill game.

Since, however, this liability of masters to answer criminally for the illegal acts of their servants might occasionally operate upon masters by putting it in the power of wicked servants to bring their masters to penalties by their own wilful violation of the law, it is sometimes enacted, for the protection of masters, that a

(p) *R. v. Great North of England Railway Co.*, 9 Q. B. 315. In *R. v. Great North of England Railway Co.*, 4 B. & Ad. 30, some of the members of a railway company were indicted with their servants for a nuisance occasioned by the railway; and see *R. v. Great North of England Railway Co.*, 3 Q. B. 543; *R. v. Train*, 3 F. & F. 22.

(q) See *R. v. Ivens*, 7 C. & P. 213, where the master refused to receive a guest. And as to that case, see *Fell v. Knight*, 8 M. & W. 269. The Innkeepers' Act, 1863 (26 & 27 Vict. c. 41), which limits the liability of innkeepers in respect of the goods of their guests, contains an exception where such goods have been lost, or injured through the wilful act, default, or neglect of such innkeeper or servant in his employ.

(r) 1 & 2 Will. IV. c. 32.

(s) See *Spicer v. Barnard*, 28 L. J. M. C. 176, which was the converse case where a tenant was held not liable for his servant killing rabbits, as he had a right to kill himself, and "qui facit per alium, facit per se."

wilfully transgressing the law shall himself be subject to a penalty, and the master, upon conviction of his servant, shall be exempt from further criminal liability (t).

And where a master has been convicted in penalties for breach of the Bread Act, 1836 (6 & 7 Will. IV. c. 37), through the wilful act, neglect, or default of any journeyman or other servant, and has paid the fines, it is provided by sect. 13 that such servant may be ordered to recompense his master for the money so paid.

There is a similar provision in the London Hackney Carriages Act, 1843 (u), and in the Alkali, &c., Works Regulation Act, 1906 (x); but under the last-mentioned Act the servant may be convicted and fined.

But where an Act of Parliament (y), which imposed various penalties on maltsters who should violate the provisions of the Act, contained also a clause for punishing, by summary proceedings before a magistrate, any workman, servant or labourer employed by or in the service of any maltster who should, maliciously and with intent to injure such maltster, violate the provisions of the Act; with a proviso that the maltster himself should still continue liable to the penalties imposed for violation of the Act, unless he should forthwith prosecute such workman, &c., to conviction, and produce to the Commissioners of Excise a certificate of such conviction; and a maltster fraudulently procured the conviction of his servant for an offence under the Act, with a view to protect himself from proceedings for the same offence, the Court of Queen's Bench granted a *certiorari* to remove, and quashed the conviction (z).

And as the liability of a master to answer criminally for the acts of his servants presupposes, and is in fact founded upon, the violation of some public duty legally binding upon the master, it can, of course, only exist where such duty exists, and must cease when such duty ceases to be binding. And, therefore, where a vessel was sunk by accident in a navigable river, and without any default on the part of the owner or his servants, as the law does not ordinarily cast upon the owner of a vessel sunk under such circumstances the duty of using any precaution, by placing a buoy or otherwise, to prevent other vessels from striking against it, it was held that the owner was not liable to an indictment, or to an action at the suit of a party sustaining injury in consequence of a collision with the sunken

(t) As in the Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 5; and in the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7, *ante*, p. 200.

(u) 6 & 7 Vict. c. 86, s. 28.

(x) 6 Edw. VII. c. 14, s. 20. So, too, the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 23, which subjects the occupier of a house, any chimney of which is on fire, to a penalty of 20s., enables him to recover it from any person by whose neglect or wilful default it was caused.

(y) 7 & 8 Geo. IV. c. 52, repealed by 43 & 44 Vict. c. 22.

(z) *R. v. Gillyard*, 12 Q. B. 527.

vessel, for omitting to remove it or take precautions to prevent accidents (a).

It may be convenient to mention in this place the Special Constables Act, 1838 (1 & 2 Vict. c. 80), which provides that whenever the appointment of special constables has been rendered necessary by the behaviour of labourers and others employed on railroads, canals, and other public works, the expenses thereof may be thrown on the companies carrying on the works.

In Cases of Tort—Civilliter.

A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment (b) in his master's service (c).

This doctrine does not appear to rest upon the notion of a principal's holding out an agent as having authority, but rather upon the ground that "the principal is the person who has selected the agent, and must therefore be taken to have had better means of knowing what sort of person he was, than those with whom the agent deals on behalf of his principal; and that, the principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him" (d). The doctrine has been summed up in the maxim, *Respondeat superior*, with reference to which Best, C.J., in 1824 (e) used the following words: "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. This maxim was first applied to public officers by the statute of Westminster 2, c. 11, from the words of which statute it is taken: '*Si custos gaolæ non habeat per quod justicietur vel unde solvat, respondeat superior suus qui custodiam hujusmodi gaolæ sibi commisit.*' The terms of the statute of Westminster the second embrace only those who delegate the keeping of goals to deputies, and

(a) *R. v. Watts*, 2 Esp. 675; *Brown v. Mallett*, 5 C. B. 599; *White v. Crisp*, 10 Ex. 312; but see *Owners of S.S. "Utopia" v. Owners of S.S. "Primula"*, [1893] A. C. 492; *Hancock v. York, Newcastle, and Berwick Railway Co.*, 10 C. B. 348. See also *Gibbs v. Liverpool Dock Trustees*, 3 H. & N. 164.

(b) The expression "course of employment" seems to mean the same as "scope of authority," a form of words which is often used: *Rigby, L.J.*, in *Dyer v. Munday*, [1895] 1 Q. B. 742. See the cases decided upon the meaning of "out of and in the course of the employment" in sect. 1 of the Workmen's Compensation Act, 1906.

(c) The exception to this rule, that for the negligence of a servant in matters in which he is employed a master is not responsible to a fellow-servant, because such negligence is to be taken as one of the ordinary risks which a servant contemplates and undertakes when entering into his employment, is considered *ante*, p. 143 *et seq.*

(d) *Hamlyn v. Houston*, [1903] 1 K. B. 81, per *Collins, M.R.*, at p. 85.

(e) *Hall v. Smith*, 2 Bing. 156, at p. 160.

were intended only, as Lord Coke tells us (2 Inst. 382), to apply 'to those who, having the custody of gaols of freehold or inheritance, commit the same to another that is not sufficient.' The principle of the statute has, however, since been extended to sheriffs, who are responsible for their under-sheriffs and bailiffs (f), but has not been applied to any other public officer. Although the office of sheriffs be now a burthensome one, yet they are entitled to poundage and other fees for acts done by their officers, which in old time might be a just equivalent for their responsibility."

Though it has been thought (g) that the doctrine of *respondeat superior* has been extended too far, it is now indisputable that with a few limitations, which will be hereafter pointed out, a master is responsible *civiliter* to third persons for any act done by his servant provided it be done in the course of his employment, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful, even if it be done in violation of his master's orders, and even if it be an act of positive malfeasance or misconduct, and though it should amount to a criminal offence (h).

And it is but reasonable that it should be so, for surely it is more just that he whose orders a servant is bound to receive and obey should suffer for the misconduct of that servant, in matters within the scope of the authority which he has given to the servant, than that an innocent third person should be prejudiced by such misconduct (i).

Accordingly, numerous instances occur in which this principle, of

(f) As in *Gregory v. Cotterell*, 5 E. & B. 571; *Boulton v. Reynolds*, 2 E. & E. 369; *Wright v. Child*, L. R. 1 Ex. 358. And "in like manner," under sect. 35 of the County Courts Act, 1888, the high bailiff of a county court is responsible for the acts and defaults of the bailiffs appointed to assist him: *Watson v. White*, [1896] 2 Q. B. 9; and for a person employed by one of his bailiffs: *Burton v. Le Gros*, 34 L. J. Q. B. 91. The principle under which a sheriff is responsible for the acts of his officers does not apply to the case of an overseer so as to make him responsible for the acts of an assistant overseer in executing a distress warrant for rates: *Baker v. Wicks*, [1904] 1 K. B. 743. The governor of a gaol has been held responsible for the act of the warders in court in wrongfully detaining an acquitted prisoner: *Mee v. Cruikshank*, 86 L. T. 708.

(g) *Smith v. Keal*, 9 Q. B. D. 340, per Sir George Jessel, M.R.

(h) *Dyer v. Munday*, [1895] 1 Q. B. 742; *Hamlyn v. Houston*, [1903] 1 K. B. 81. In *Dunkley v. Farris*, 11 C. B. 457, an attorney was compelled to pay costs occasioned by his clerk fraudulently simulating the seal of the Court upon a writ, Jervis, C.J., remarking: "There are many acts of a servant for which, though criminal, the master is civilly responsible by action."

(i) The knowledge of the servant may sometimes be treated as the knowledge of the master. In an action for keeping a ferocious dog which bit the plaintiff, evidence of knowledge on the part of a servant of the defendant that the dog was ferocious may in some cases be evidence against the defendant; as where the servant has been entrusted by the defendant with the care and control of the dog: *Baldwin v. Casella*, L. R. 7 Ex. 325; or where the servant is the defendant's manager, and has control of the premises where the dog is, but not where the servant is merely a carter or a porter employed there: *Stiles v. Cardiff Steam Navigation Co.*, 33 L. J. Q. B. 311. But knowledge on the part of the defendant's wife, who attended to the defendant's business at the premises where the dog was kept, was held to be evidence against the defendant: *Gladman v. Johnson*, 36 L. J. C. P. 153; and knowledge on the part of the barman at the defendant's public-house: *Applebee v. Percy*, L. R. 9 C. P. 647. See also *Baker v. Snell*, [1908] 2 K. B. 825.

holding the master responsible *civilter* for the tortious acts of his servants, has been acted upon and enforced (*k*).

Thus, where (*l*) the servants of A. brought a coach with two ungovernable horses into Lincoln's Inn Fields, to train them, and they "being not to be managed ran upon the plaintiff," the master was held liable for the damage occasioned. In fact, actions against masters for damages sustained by the negligent driving of their servants are so common, that it is unnecessary to multiply instances of the master's liability in such cases.

So a master is answerable for the loss of a customer's property entrusted to his servant in the course of his business as a tradesman (*m*); and an innkeeper has been held liable for damage to the horse and gig of a guest through the negligence of the ostler (*n*), though he paid the ostler no wages, but left him to make what he could out of the stables.

Again, where (*o*) the defendant's servants so negligently kept a fire lighted in his field, that it extended to and consumed the heath of the plaintiff, the defendant was held liable to an action for the injury, and Lord Holt observed, "If the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire, for it shall be intended that the servant had authority from his master, it being for his master's benefit" (*p*).

And a coal merchant has been held liable to a foot-passenger for the negligence of his carter in leaving open a coalshoot in the pavement of a public highway (*q*).

(*k*) It does not follow that first one and then the other can be rendered liable. An award of compensation by a magistrate against the driver of a hackney carriage under 6 & 7 Vict. c. 86, is a bar to a subsequent action against the driver's master in respect of the same injuries: *Wright v. London General Omnibus Co.*, 2 Q. B. D. 271. A conviction of a servant for an assault whereby, under 24 & 25 Vict. c. 100, he was released from civil proceedings for the assault would not release his master from any liability: *Dyer v. Munday*, [1895] 1 Q. B. 742. But the recovery of compensation for damage caused to the plaintiff's goods by the negligent driving of the defendant's servant will not be a bar to a subsequent action between the same parties in respect of personal injuries caused to the plaintiff by the same negligent driving: *Brunsdon v. Humphrey*, 14 Q. B. D. 141.

(*l*) *Michael v. Alestree*, 2 Lev. 172. (*m*) *Armory v. Delamirie*, 1 Sm. L. C. 356

(*n*) *Bather v. Day*, 32 L. J. Ex. 171.

(*o*) *Turberville v. Stampe*, Lord Raym. 264. And see *Beaulieu v. Finglam*, 2 H. 4, fo. 18, pl. 6, cited 1 C. B. 586, note; *Serendat v. Saisse*, L. R. 1 P. C. 152; *Mackenzie v. M'Leod*, 10 Bing. 385. A person on whose property a fire accidentally burns is not now liable to an action at the suit of any person who may be injured thereby: see 14 Geo. III. c. 78, s. 86, which is a general law; *Richards v. Easto*, 15 M. & W. 251; *Westminster Fire Office v. Glasgow Provident Society*, 13 App. Cas. 699. But where a fire is caused, or having been knowingly lighted is permitted to extend, by negligence, the master is still liable: *Filliter v. Phippard*, 11 Q. B. 347; *Black v. Christchurch Finance Co.* [1894] A. C. 48.

(*p*) Note the difference between this case and *Williams v. Jones*, 3 H. & C. 602, where a master was held not liable for a fire caused by the negligent use of a pipe by his servant.

(*q*) *Whiteley v. Pepper*, 2 Q. B. D. 276.

When an authority has been given by a landlord to his bailiff to distrain for rent upon goods and chattels upon certain specified premises, it would be outside the scope of the bailiff's employment to seize fixtures (*r*) or goods which by law are admittedly not distrainable (*s*), or to seize goods upon other premises than those named in his warrant (*t*), and for such acts the landlord would not be responsible unless he chose to ratify them; but for a mere irregularity by the bailiff in doing that which he was authorised to do the landlord would be liable (*u*). So a water company was held not to be liable for an assault committed by their broker when executing their warrant for the recovery of water rate (*x*).

The proprietor of a newspaper who publishes a libel by his servants is the publisher of it, and he is liable for the acts of his servants. "The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it" (*y*). And if a person requests another to publish a defamatory statement, and the latter publishes the matter, adhering to the sense and substance of it, although the language be to some extent his own, the person making the request is liable to an action as the publisher (*z*).

Under the London Hackney Carriage Acts, the relation between cab proprietor and cab-driver is to be deemed, so far as the public is concerned, to be that of master and servant, and the cab proprietor will be liable accordingly (*a*); and this effect of the Acts is not limited to the case of licensed cab proprietors only (*b*). But apart from those Acts the relation between cab proprietor and cab-driver would ordinarily be that of bailor and bailee (*c*).

Common carriers of goods by land are by the common law absolutely responsible for loss or damage to goods carried by them as common carriers, except where the loss or damage is due to the act of God or the King's enemies, or the inherent vice of the thing carried. This

(*r*) *Freeman v. Rosher*, 13 Q. B. 780.

(*s*) *Gauntlett v. King*, 3 C. B. (N. S.) 59.

(*t*) *Lewis v. Read*, 13 M. & W. 834.

(*u*) *Haseler v. Lemoyne*, 5 C. B. (N. S.) 530.

(*x*) *Richards v. West Middlesex Waterworks Co.*, 15 Q. B. D. 660. In *Kinsella v. Hamilton*, 26 L. R. Ir. 671, it was held that an authority to distrain for rent gave no implied authority to shoot a person who tried to prevent the distress from being levied. Pallett, C.B., said (at p. 689): "The doctrine by which a master is held responsible for an illegal act of his servant, done without his express direction within the scope of a legal employment, is not that an authority to do an illegal act is implied, but that the master gave the servant implied authority to determine whether a state of facts had occurred in which the act might legally have been done, and therefore was bound *ad hoc* by the existence of the state of facts which his servant, acting within his authority, had determined to exist and acted upon to the prejudice of another."

(*y*) *Emmens v. Pottle*, 16 Q. B. D. 354, per Lord Esher, M.R., at p. 357.

(*z*) *Parkes v. Prescott*, L. R. 4 Ex. 169.

(*a*) *Powles v. Hider*, 6 E. & B. 207; *King v. London Improved Cab Co.*, 23 Q. B. D. 281; *Keen v. Henry*, [1894] 1 Q. B. 292; overruling *King v. Spurr*, 8 Q. B. D. 104.

(*b*) *Gates v. R. Bill & Son*, [1902] 2 K. B. 38.

(*c*) *Venables v. Smith*, 2 Q. B. D. 279; *Fowler v. Lock*, L. R. 10 C. P. 90; *Steel v. Lester*, 3 C. P. D. 121; *Smith v. General Motor Cab Co., Ltd.*, [1911] A. C. 188.

liability is limited by the Carriers Act, 1830 (11 *Geo. IV. & 1 Will. IV. c. 68*), which provides by sect. 1 that they shall not be liable for loss or damage in respect of certain specified articles above the value of £10 unless the value and nature of such articles is declared when delivered and an increased charge accepted. This section protects a carrier from liability even though the loss happens through the gross negligence of his servant (*d*). Sect. 8 provides that nothing in the Act shall be deemed to protect any common carrier for hire from liability for loss or injury to any goods or articles arising from the felonious acts of any servant in his employ, or to protect any such servant from liability for any loss or injury occasioned by his own personal neglect or misconduct. This section is not a general enactment, but is confined to the case of the valuables specified in the Act (*e*). Felony by a servant is therefore an answer to a defence based on the Act of 1830 (*f*). The plaintiff must make out a case of something more than suspicion, and must show a *prima facie* case of felony on the part of some servant of the defendant (*g*). A sub-contractor's servant, such as the servant of the proprietor of a receiving house for goods nominated by the defendant, is a servant in the defendant's employ within sect. 8 (*h*). A carrier, however, is not answerable for loss of luggage entrusted to his servant to carry for his own private gain (*i*), or in defiance of a known course of business (*k*); but carriers have been held liable for goods delivered to their servant, notwithstanding a bye-law that they would not be liable unless booked, in the absence of evidence that they had provided means of booking (*l*). The Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c. 31*), provides by sect. 7 that every railway and canal company shall be liable for the loss of, or for any injury done to, any goods in the receiving, forwarding, or delivering thereof "occasioned by the neglect or default of such company or its servants," notwithstanding any notice, condition or declaration by the company limiting such liability, provided that the company may make such conditions with respect to receiving, forwarding, and delivering goods as shall be adjudged by the Court to be just and reasonable (*m*). A loss of goods by the theft of a railway company's servant, without negligence on the part of the com-

(*d*) *Hinton v. Dibbin*, 2 Q. B. 646.

(*e*) *Butt v. Great Western Railway Co.*, 11 C. B. 140; *Shaw v. Great Western Railway Co.*, [1894] 1 Q. B. 373.

(*f*) *Great Western Railway Co. v. Rimell*, 18 C. B. 575; *Metcalf v. London, Brighton, &c., Co.*, 4 C. B. (N. S.) 307.

(*g*) *Vaughton v. London and North Western Railway Co.*, L. R. 9 Ex. 93; *M'Queen v. Great Western Railway Co.*, L. R. 10 Q. B. 569.

(*h*) *Machu v. South Western Railway Co.*, 2 Ex. 415; *Stephens v. London and South Western Railway Co.*, 18 Q. B. D. 121.

(*i*) *Butler v. Basing*, 2 C. & P. 613; *Boucher v. Lawson*, Ca. temp. Hardwicke, 85.

(*k*) *Slim v. Great Northern Railway Co.*, 14 C. B. 647.

(*l*) *Great Western Railway Co. v. Goodman*, 12 C. B. 313; *Williams v. Great Western Railway Co.*, 10 Ex. 15.

(*m*) *Peek v. North Staffordshire Railway Co.*, 10 H. L. C. 473; *Great Western Railway Co. v. M'Carthy*, 12 App. Cas. 218.

pany, is not a loss occasioned by "neglect or default" within sect. 7, and the company can therefore at common law protect themselves against liability by a special contract, though such contract would not be reasonable within sect. 7 (n).

In interpreting contracts with carriers by sea, as well as by land, words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no negligence or default on his part or that of his servants. So that even in cases within the exceptions of a bill of lading the ship-owner is not protected if default or negligence on his part or that of his servants (unless clearly provided against) has contributed to the loss (o).

Carriers of passengers also are responsible for injuries happening to them through the negligence of servants (p), but not if such injuries happen by accident (pp). Whether or not the injury complained of in any particular case arose from the negligence of servants, or was the effect of accident, would be a question proper for the consideration of a jury (q).

Some doubt has at times been expressed as to the liability of a corporation for the wrongful acts of its servants, but the whole tenor of authorities, from *Yarborough v. Bank of England* (r) down to the present, shows that an action for a wrong lies against a corporation where the thing done is within the purpose of the incorporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. As was observed by Blackburn, J. (s), "if a corporation cannot know anything except by its servants, or do anything except by its servants, it would seem that the corporation must be liable for the knowledge of its servants and the acts of its servants, or not liable at all." And in the words of Farwell, L.J.: "It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, notwithstanding that it is acting in the performance of public duties, like a local board of health, or of eleemosynary and charitable functions, like a public hospital" (t). In recent times the only doubt that has

(n) *Shaw v. Great Western Railway Co.*, [1894] 1 Q. B. 373.

(o) *Grill v. General Iron Screw Collier Co.*, L. R. 3 C. P. 476; *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521; *Steinman v. Angier Line*, [1891] 1 Q. B. 619; *Price v. Union Lighterage Co.*, [1904] 1 K. B. 412.

(p) *White v. Boulton, Peake*, 81; *Thomas v. Rhymney Railway Co.*, L. R. 6 Q. B. 266; *Foulkes v. Metropolitan Railway Co.*, 5 C. P. D. 157.

(pp) *Crofts v. Waterhouse*, 3 Bing. 319. Where the balance is even as to the cause of the accident, the onus is on the plaintiff to turn the scale: *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Hammack v. White*, 11 C. B. (N. S.) 588; *Manzoni v. Douglas*, 6 Q. B. D. 145; *Wakelin v. London and South Western Railway Co.*, 12 App. Cas. 41.

(q) *Briddon v. Great Northern Railway Co.*, 28 L. J. Ex. 51, where a train was detained by snow.

(r) 16 East, 6. See *Maund v. Monmouthshire Canal Co.*, 4 M. & G. 452.

(s) *Penhallow v. Mersey Docks and Harbour Board*, 30 L. J. Ex. 331.

(t) *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K. B. 820.

been felt is how far a corporation can be capable of malice. It is clear that an action is capable of being maintained against a corporation for a libel published by its servant within the scope of his authority (*u*). But more doubt has been felt in cases in which the onus has been on the plaintiff of proving express malice on the part of the defendant. It has been held that an action of malicious prosecution will not lie against a corporation (*x*), but in later cases (*y*) the opposite view has been taken.

A corporation cannot escape liability in an action of trespass for assault committed by its servant, on the ground that his authority was not under seal (*z*); and a corporation has been held liable for illegal distress by their bailiff although his appointment was not under seal (*a*); while in the Exchequer Chamber it was laid down that it was the duty of a company carrying on trade to have on the spot an officer with authority to do for the company all that in the ordinary exigencies of their business might require to be done promptly, and in this respect there was no difference between an ordinary partnership and a corporation, and that it was not necessary to show any authority under seal to the officer of the company to render the company liable for acts which he was authorised to do (*b*). On the other hand it has been held that a corporation might maintain an action of ejectment after notice to quit given by their steward, although he had no authority under seal (*c*).

Where (*d*) the owner of a boat, which was accustomed to ply for hire and carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master, it was held that the servant was acting at the time in the course of his master's service, and for his master's benefit, and the master was answerable for his act, and would

(*u*) *Whitfield v. South Eastern Railway Co.*, E. B. & E. 115; *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423; *Glasgow Corporation v. Lorimer*, [1911] A. C. 209.

(*x*) *Stevens v. Midland Counties Railway Co.*, 10 Ex. 352; and see per Lord Bramwell in *Abrath v. North Eastern Railway Co.*, 11 App. Cas. 247.

(*y*) *Edwards v. Midland Railway Co.*, 6 Q. B. D. 287; *Henderson v. Midland Railway Co.*, 24 L. T. 881; *Kemp v. Courage & Co.*, 7 T. L. R. 50; *Rayson v. South London Tramways Co.*, [1893] 2 Q. B. 304; *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392; [1900] 1 Q. B. 22; *Bank of New South Wales v. Owston*, 4 App. Cas. 270.

(*z*) *Eastern Counties Railway Co. v. Broom*, 6 Ex. 314.

(*a*) *Smith v. Birmingham Gas Co.*, 1 A. & E. 526. But an appointment under seal is necessary in the case of a bailiff entering lands for condition broken in order to revest the estate; *Horne v. Ivy*, 1 Mod. 18.

(*b*) *Giles v. Taff Vale Railway Co.*, 2 E. & B. 822.

(*c*) *Roe v. Pierce*, 2 Camp. 96; *Doe v. Bold*, 11 Q. B. 127.

(*d*) *Huzzey v. Field*, 2 C. M. & R. 432. Where the lessee by parol of a ferry, finding it did not answer, agreed to become servant to the lessor and account to him for the profits of the ferry, his interest as tenant was held to have been surrendered by operation of law: *Peter v. Kendal*, 6 B. & C. 703. In *Blackwell v. Wiswall*, 24 Barbour's (Amer.) Rep. 355, the lessor of a ferry was held not liable for the acts of lessee's servants.

have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry.

A person may be liable for a fraud committed by his agent or servant, if the agent or servant committed it while acting within the scope of his authority, while doing, and purporting to do, something on behalf of his employer, although in doing it he commits a wrong which his employer neither sanctioned nor intended. But if the agent or servant is not acting or purporting to act for his employer, the fraud cannot be treated as the fraud of the employer (*e*). It is not necessary, in order that the employer may be rendered liable, that the fraud should be committed by the agent or servant for his employer's benefit. If it was committed by the agent for his own benefit, and his principal did not benefit by the fraud, the principal can nevertheless be made liable for it. "A principal must be liable for the fraud of his agent committed in the course of his agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not" (*f*). Willes, J., in a case in the Exchequer Chamber (*g*), said: "If it was a fraud on the part of the manager, then arises the question whether the bank, the employers, are answerable for it? It is enough to say as to that, that we conceive we are in no respect overruling the opinion of two of the learned Barons, Martin and Bramwell, in the case of *Udell v. Atherton* (*h*); which was most relied on to establish the proposition that a principal is not answerable for the fraud of his agent. Upon looking to that case it seems very clear that the division of opinion which took place in the Court of Exchequer arose, not so much on the question whether the principal is answerable for the act of his agent in the course of his business (for that question was settled as early as Lord Holt's time), as on the application of that principle to the peculiar facts of the case. The person whose act was relied on there as constituting a liability on the sellers, was the defendant's agent, adopted by them under peculiar circumstances, and not being their general agent in their business, as the manager of the bank is here. But with respect to the question whether a principal is answerable for the acts of his agent done in the course of his master's business, and for the master's benefit, no sensible distinction can be drawn between the case of fraud and that of any other wrong, as to which the general rule is that the master is answerable for such wrong if committed in the course of his service, and for his benefit. That is the principle which is acted on every day in running-down

(*e*) *Thorne v. Heard*, [1895] A. C. 495.

(*f*) *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716, per Lord Macnaghten at p. 731.

(*g*) *Barwick v. English Joint Stock Bank*, 36 L. J. Ex. 147.

(*h*) 7 H. & N. 172. See remarks on this case by Lord Macnaghten in *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716.

cases, and which has been applied also to direct trespasses to goods, as where owners of ships have been held liable for the acts of the masters abroad in improperly selling cargoes. It has been held applicable to actions of false imprisonment in cases where officers of a railway company intrusted with the execution of bye-laws have wrongfully, but intending to act in the course of their duty, imprisoned persons supposed to have come within the bye-laws. It has been acted on in the case of a person employed by the owner of boats to navigate boats and take fares for their use, where a ferry has been infringed, or suchlike wrong committed. In all these cases it may be said, as it was said here, that the master had not authorised the act. It is true he has not authorised the particular act, but he has put his agent in his place as to a class of acts, and he must be answerable for the manner in which the agent conducts himself in doing his business."

This judgment must not be taken to mean that the master is not answerable for the wrong of his servant, committed in the course of his service, if it be not committed for the master's benefit. So where a client consulted a firm of solicitors as to certain property and was seen by a managing clerk of the firm who, while professing to act on behalf of the firm, fraudulently induced the client to transfer the property into his name and subsequently realised and appropriated it for his own benefit, the firm was held liable to make good to the client the loss which she had sustained by reason of their managing clerk's fraud (*i*).

It has, however, been held in the House of Lords (*k*), that negligence of trustees of a corporation, in leaving the corporate seal in the hands of the secretary, whereby he was enabled fraudulently to affix it to five powers of attorney for the transfer of stock belonging to the corporation, did not prevent them from saying that the powers of attorney were forged, and suing the bank for not transferring the stock on their subsequent application. In giving the opinion of the judges to the House of Lords in that case, Lord Wensleydale said: "If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal? It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the

(*i*) *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716.

(*k*) *Bank of Ireland v. Trustees of Evans's Charities*, 5 H. L. C. 389. See also *Merchants of the Staple of England v. Bank of England*, 21 Q. B. D. 160; and compare *Bank of England v. Vagliano*, [1891] A. C. 107.

trustees to be parties to misleading the banker in making the transfer on the forged power of attorney."

It may be convenient to mention in this place that it has been held that a telegraph company are not liable to an action at the suit of the receiver of a wrong message for the mistake of their clerk in transmitting it, although the mistake caused serious loss to the plaintiff (l).

Though the general rule of law is perfectly clear that a master is not civilly responsible for a wrong done by his servant, unless it be done in the course of the servant's employment, or within the scope or sphere of his employment, it is sometimes difficult to apply the law in particular cases and to decide whether or not any particular act or omission by a servant can be said to have taken place in the course of his employment. The law was thus laid down by Willes, J. (m): "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not for any caprice of the servant, but in the course of the employment."

It is difficult, said Lord Coleridge, C.J., to say that it is within the scope of a clerk's employment to wash his hands, but it is clearly "an incident to his employment" (n), and it was held that where a clerk, upon leaving off his day's work, turned on the tap in a lavatory provided for the use of himself and other clerks in the defendant's service, and then went away without turning the tap off, so that in the night the water overflowed, and going through the floor, damaged the plaintiff's goods in the room below, the employer of the clerk was responsible for the clerk's negligence. The Court distinguished this case from an earlier one (o), in which also a clerk negligently left the tap of a lavatory turned on, so that the water overflowed and damaged the property of the plaintiffs in the room below. There the employer of the clerk was held not to be answerable for the negligence of his servant because the clerk had been forbidden to enter the room where the tap was, and was therefore a trespasser when he went into the room and committed the negligent act complained of.

(l) *Dickson v. Reuter's Telegraph Co.*, 3 C. P. D. 1, following *Playford v. United Kingdom Telegraph Co.*, L. R. 4 Q. B. 706.

(m) *Bayley v. Manchester, Sheffield and Lincolnshire Railway Co.*, L. R. 7 C. P. 415, affirmed in the Exchequer Chamber, L. R. 8 C. P. 148.

(n) *Ruddiman v. Smith*, 60 L. T. 708.

(o) *Stevens v. Woodward*, 6 Q. B. D. 318. In *Milner v. Great Northern Railway Co.*, 50 L. T. Rep. 367, a clerk at the parcels office on the defendants' railway took a parcel to the train for a passenger; and it was held that there was evidence before the Court, that in doing this he was acting within the scope of his employment.

Disobedience to his master's express orders will not in every case have the effect of making the act disobediently done by the servant an act outside the scope of his employment so as to relieve the master from liability. Much depends on whether the orders of the master limit the sphere of his servant's employment; but if the servant, acting within that sphere, violates the orders of his master, his master is responsible to third persons to whom damage is thereby caused. The master cannot, by private instructions to his servant as to the mode of performing acts of service within the sphere of his employment, relieve himself from liability to third persons for injuries caused by the servant by such acts (p).

Many of the cases in which the question has been raised whether the servant in what he did was acting within the scope of his authority, or whether he was acting, not for his master, but for purposes of his own, have arisen out of the driving of carts and horses.

In an action (q) for the negligent driving of the defendant's coachman, whereby the plaintiff's carriage was upset, it appeared that the accident arose from the defendant's coachman striking the plaintiff's horses with his whip, in consequence of which they moved forward, and the chariot was overturned. At the time when the horses were struck the two carriages were entangled. The defendant was held liable for the damage caused by his servant's act, although wanton, as it was done in pursuance of his employment. And, *per Curiam*: "The distinction is this: if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment."

So a master was held (r) liable for damage caused by the negligent driving of his cart in the city by his servant, although it was proved that the cart ought not, in carrying out his orders, to have been in the city at all; and Lord Wensleydale said: "If the servant, being on his master's business, took a *détour* to call upon a friend, the master will be responsible. If you think the servant lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment.

(p) *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Betts v. de Vitre*, L. R. 3 Ch. 429, at 442.

(q) *Croft v. Alison*, 4 B. & Ald. 590.

(r) *Joel v. Morison*, 6 C. & P. 501.

If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his masters' business, the master will not be liable."

A master was held liable for damages caused by his cart, which was intrusted to his servant, but which another person, a friend of the servant, was driving when the accident happened; Lord Abinger saying he thought that as the defendant's servant was in the cart, the reins being held by another man made no difference (s).

Again, a master was held (t) liable for damages caused by the negligent driving of his servant, who, after having set his master down, drove round to deliver a parcel of his own, and did not drive directly where he was ordered to go, *Erskine, J.*, saying: "Evidence has been given that the master directed the servant to drive to the Red Lion, in Castle Street, but that the servant improperly drove to the Old Street Road to deliver a parcel of his own; and the point has been put to the Court that, inasmuch as it is clear that the servant was not at that time engaged in his master's business, this action cannot be maintained. But I am of opinion that this action may be maintained. I think the law has been most properly laid down by Mr. Baron Parke in the case which has been cited (u). It is quite clear that if a servant without his master's knowledge takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted his servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage it is no answer that the servant acted improperly in the management of it" (x).

But in the two cases next mentioned, the master was held not responsible. The defendants' carman, having finished the business of the day, returned to their shop in Welbeck Street with their horse and cart, and got the key of the stable, which was close by, but instead of going there at once and putting up the horse as it was his duty to do, he, without his masters' knowledge or consent, drove a fellow-workman to Euston Square, and on his way back ran over and injured the plaintiff; it was held, that inasmuch as the carman was not at the time of the accident engaged in his masters' business, they were not responsible for the consequences of his unauthorised act (y). And Maule, J., said: "The master is liable, even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it, in the strictest and most convenient manner. But where the servant,

(s) *Booth v. Mister*, 7 C. & P. 66. See also *Wheatley v. Patrick*, 2 M. & W. 650.

(t) *Sleath v. Wilson*, 9 C. & P. 607; *S. C. nomine Heath v. Wilson*, 2 M. & Rob. 181.

(u) *Joel v. Morison*, *ubi supra*.

(x) But see what Cockburn, C.J., said as to this in giving judgment in *Storey v. Ashton*, cited *infra*.

(y) *Mitchell v. Crassweller*, 13 C. B. 237.

instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it."

Again, where a wine merchant carrying on business in V. Street, Minories, sent his clerk in a cart to deliver wine at Blackheath, and it was the carman's duty to bring back empty bottles to V. Street, and then to put up the horse and cart; but on the way back the clerk asked the carman to drive him to his house in the City Road, and asked him to go elsewhere, and when they had proceeded about two miles out of the way, the plaintiff was knocked down by the cart, and seriously injured, the defendant was held not liable (z). And Cockburn, C.J., said: "I think the law as laid down in *Mitchell v. Crassweller* (a) presents us with a true view of the case. I cannot adopt the proposition of Erskine, J., in *Sleath v. Wilson* (b), that whenever the master has intrusted his servant with the control of the carriage it is no answer that the servant acted improperly in the management of it. I think that a servant can only be said to be acting in the employment of his master, so long as he is doing some act with his master's assent. I think that if a driver while acting in his master's business were to make a slight deviation in order to carry some business of his own into effect, in such a case the master might be liable, and that the question would be one of degree as regards the extent of the deviation. But this is not the present case. Here the man starts upon an entirely independent journey which has nothing to do with that which he undertook on behalf of his employer. While returning home by way of King William Street he starts on a journey to the City Road, and is two miles out of the way when the accident happens. In *Mitchell v. Crassweller*, the driver after returning to his master's house started upon an entirely independent journey. Here the case is not quite so strong, but in deviating as he did the driver did in fact start upon an independent journey. I think that it would be a strange thing to hold that in such a case the master is responsible." Mellor, J., and Lush, J., concurred.

If a servant without his master's permission, and for a purpose of his own wholly unconnected with his master's business, takes out his master's horse and cart, and by his negligence in driving injures someone on the road, the fact that he had used the opportunity of being out with the cart to call on his master's customers and do jobs of such a nature as he was usually employed to do, will not make his master answerable for his negligence (c).

But where a servant is employed to manage a horse and cart for

(z) *Storey v. Ashton*, 38 L. J. Q. B. 223.

(a) *Supra*, p. 219.

(b) *Supra*, p. 219.

(c) *Rayner v. Mitchell*, 2 C. P. D. 357; *Cormack v. Digby*, I. R. 9 C. L. 557.

the day, the fact that while it is under his charge he uses it for some purpose of his own, though in violation of his instructions, will not render his use of the cart outside the scope of his authority (*d*)

Two servants were directed to take two horses from their stables to a forge to be shod. They raced along the road to see who could get to the forge first, and the noise they made caused the plaintiff's horse to take fright and bolt, whereby the plaintiff was upset and injured. It was held (*e*) that the servants were acting within the scope of their authority so as to make their master liable.

This liability of the master for the act of his servant when driving for him is forcibly illustrated by a case (*f*) in which an omnibus company were held liable for the acts of their driver in "nursing" a rival omnibus, whereby the omnibus of the defendants ran against the horses and omnibus of the plaintiff and overturned it, although it was a direct contravention of the printed regulations of the company to race with or obstruct other omnibuses or hinder or annoy the driver or conductor thereof in his business, whether that omnibus be one belonging to the company or otherwise. And the Exchequer Chamber upheld the direction of Martin, B., to the jury, that if the defendants' driver being irritated acted carelessly, recklessly, wantonly or improperly, but in the course of his employment, and in doing that which he believed to be for the interests of the defendants, then the defendants were responsible for the acts of their servant: that the instructions given by the defendants to the driver not to obstruct other omnibuses, if he did not pursue them, were immaterial as to the question of the master's liability, but if the true character of the driver's act was that it was an act of his own, and in order to effect a purpose of his own, then the defendants were not responsible (*g*).

The defendants were taxi-cab proprietors. In obedience to the orders of the general manager, one of the drivers employed by the defendants drove him in one of the defendant's taxi-cabs, not on the business of the defendants, but on the private business of the general manager who had no authority thus to use taxi-cabs. In the course of the drive the plaintiff was injured by reason of the driver's negli-

(*d*) *Whatman v. Pearson*, L. R. 3 C. P. 422; *Venables v. Smith*, 2 Q. B. 279.

(*e*) *Gracey v. Belfast Tramway Co.*, [1901] 2 Ir. R. 322.

(*f*) *Limpus v. London General Omnibus Co.*, 1 H. & C. 526.

(*g*) In *Ward v. London General Omnibus Co.*, 42 L. J. C. P. 265, Blackburn, J., said, "a master is responsible for his servant's act in his business, though the servant be excited by drink or passion; but if the servant act for private spite, if the act be done so as to divest him of his character as servant, the master is not responsible. In America it has been held that the rule, relieving a master from liability for a malicious injury inflicted by his servant, when not acting within the scope of his employment, does not apply as between a common carrier of passengers and a passenger: *Stewart v. Brooklyn and Crosstown Railroad Co.*, 90 N. Y. Rep. 588. So a railway company has been held liable when their conductor threw a passenger off the platform into the street: *Schulz v. Third Avenue Railway Co.*, 89 N. Y. 242; and for an assault by a brakeman upon a passenger who accused him of having stolen his watch: *Chicago and Eastern Railroad Co. v. Flaxman*, 42 Amer. Rep. 33.

gence. The taxi-cab company were held liable. The driver knew nothing about the general manager's improper conduct in the use of the taxi-cab. At the time of the accident he was driving as the defendants' servant by the direction of the general manager, whose orders he was bound to obey (h).

The defendants sent a barge under the management of a man to a wharf to be loaded; he was unable to get up to the wharf in consequence of the plaintiff's barge lying in the way with another barge in charge of it. The foreman of the wharf told him to send the plaintiff's barge away as it had no business there, and to load another barge on alongside. He moved the plaintiff's barge, and made it run aground on a pile in the river. When the tide went down the plaintiff's barge settled upon a projection in the bed of the river and was injured. It was held that the defendants were liable, as the foreman was acting within the scope of his employment as their servant.

Where the general manager of the defendant, a horse-dealer, used a horse and gig of his own, which he used for the defendant's business as well as his own, and was allowed to keep it on the defendant's premises at his expense; and on one occasion the general manager, on putting the horse into the gig, told the defendant that he was going to S. to collect a debt for him and afterwards to see a doctor, and before he got to S. he ran the gig against and killed the plaintiff's horse; it was held that there was abundant evidence to make the defendant responsible, although he had not requested the manager to use the horse and gig on that occasion. And it was also held that the proper question to leave to the jury was whether at the time of the act complained of, the servant was on his master's business and with his authority (k).

In the following cases questions were raised as to the authority of servants of omnibus proprietors with regard to the management of omnibuses, the plaintiff in both cases having been injured by negligent driving.

In one case (l), the driver in the defendants' service was lawfully forbidden by a police inspector to continue driving on account of being drunk, and not in a fit state to drive. A man spontaneously volunteered to drive the omnibus home, and did so with the permission of the defendants, but so negligently as to injure the plaintiff. It was held that when the driver was forbidden by the police to continue driving the omnibus was only a quarter of a mile from the defendants' premises, and that there was no necessity for taking it home immediately, without first communicating with the defendants. The Court held that the act was not within the scope of the driver's authority to delegate the

(h) *Irwin v. Waterloo Taxi-cab Co., Ltd.*, [1912] 3 K. B. 588.

(i) *Page v. Defries*, 7 B. & S. 137; overruling *Lamb v. Palk*, 9 C. & P. 100.

(k) *Patten v. Rea*, 2 C. B. (N. S.) 606.

(l) *Gwilliam v. Twist*, [1895] 2 Q. B. 84.

of the omnibus to anyone else, unless there is a necessity for so doing, so as to render the defendants liable for the negligent driving of such a person; and that there was no evidence of any necessity for such delegation.

In the other case (*m*) also the Court held that on the evidence the defendants were not liable. The plaintiff had been injured by the negligent driving of the conductor of an omnibus, who, at the end of a journey, and in the absence of the regular driver, took charge of the omnibus and drove it round through some neighbouring by-streets, apparently with the intention of turning it round, ready to start for the next journey. The plaintiff had to show that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment, and that the conductor was a person who was authorised to do the act. There was no evidence to that effect.

In the following case a different principle applied. A motor-omnibus was being driven by the conductor, a person not authorised to drive. The proper driver sat beside him on the box. The omnibus mounted the pavement and injured, among others, the plaintiff. It was held that there was evidence of negligence on the part of the driver in allowing the conductor's negligent driving. It was not a question of delegation of authority (*n*).

The extent to which a master may be answerable for the conduct of his servant in giving into custody a person suspected of having committed a criminal offence has also been the subject of several decisions. In these cases as in other cases where a master is sought to be made liable for the act of his servant the questions for the jury will be first as to the scope of the servant's employment, and then, if the act be within the scope, as to the purpose with which the act was done, whether in the interests of the master or for the servant's own benefit.

In the case of certain statutory offences power has been given by Act of Parliament to railway companies to apprehend and detain the offender. When an offence of this kind has been committed, the higher officials of the railway company, such as stationmasters and inspectors, would be presumed to be authorised by the company to exercise the company's statutory powers (*o*); but if a stationmaster apprehended a person for doing an act in respect of which the railway company had no power to apprehend anyone, his act would not be presumed to be within the scope of the authority given to him (*p*). But a company would not be relieved from liability, merely

(*m*) *Beard v. London General Omnibus Co.*, [1900] 2 Q. B. 530.

(*n*) *Ricketts v. Thos. Tilling, Ltd.*, [1915] 1 K. B. 644.

(*o*) *Goff v. Great Northern Railway Co.*, 30 L. J. Q. B. 148; *Moore v. Metropolitan Railway Co.*, L. R. 8 Q. B. 36; *Kirkstall Brewery Co. v. Furness Railway Co.*, L. R. 9 Q. B. 468.

(*p*) *Poulton v. London and South Western Railway Co.*, L. R. 2 Q. B. 534.

because no offence was in fact committed (*q*). Authority to turn out a passenger misconducting himself necessarily authority to the servant to judge for himself who is passenger (*r*). So, too (*s*), a railway company was held re where a porter, authorised by them to prevent passengers fr by wrong trains, violently pulled a passenger out of a carriage, though wrongly, that the passenger was in a wrong train; action failed where a railway porter arrested a passenger for in a class of carriage superior to that for which he had a tick being no power in the railway company to arrest for such ar so that the porter could have had no authority, implied or o from his employers to make the arrest (*t*).

Under some circumstances a servant may have an implied from his master to give into custody a person suspected of ste master's goods. But in the case of an ordinary servant, authority will be implied unless the act of the servant which plained of was necessary for the protection of the property to him, and in such case the time, place, and opportunity of c the employer before acting would be material circumstance considered in determining the question of authority (*u*). accordingly held that the manager of a bank has no implied a to give a man into custody for stealing a bill of exchange v arrest is not necessary for the protection of the property of t but was only for the purpose of punishing him and vindicating Similarly a railway booking clerk was held (*x*) to have no implic rity to give into custody a man who had merely attempted to company's till, but failed to get possession of any money. The of the company not being in danger, the clerk had no implied a to act as he did. So, too, a foreman porter in superintende station yard was held (*y*) to have no implied authority to plaintiff into custody on a charge of stealing timber lying : station, the act of the porter not being done in the exigencie company's traffic. And where the manager of a public-house plaintiff into custody on the charge of attempting to pass bad it was held (*z*) that as no property of the manager's employe danger, the manager had no authority to do what he had done, employer was not liable. The principle applied that although a

(*q*) *Goff v. Great Northern Railway Co.*, *ubi supra*.

(*r*) *Seymour v. Greenwood*, 30 L. J. Ex. 328; *Lowe v. Great Northern Co.*, 62 L. J. Q. B. 524.

(*s*) *Bayley v. Manchester, Sheffield and Lincolnshire Railway Co.*, L. R. 415; L. R. 8 C. P. 148.

(*t*) *Ormiston v. Great Western Railway Co.*, [1917] 1 K. B. 598.

(*u*) *Bank of New South Wales v. Owston*, 4 App. Cas. 270.

(*x*) *Allen v. London and South Western Railway Co.*, L. R. 6 Q. B. 61; *Knight v. North Metropolitan Tramway Co.*, 78 L. T. 227.

(*y*) *Edwards v. London and North Western Railway Co.*, L. R. 5 C. P. .

(*z*) *Abrahams v. Deakin*, [1891] 1 Q. B. 516.

acts with a view to protecting his employer's property against similar attempts in the future, he has no implied authority to take a man into custody for that which has already been done. And in another case (a) where the manager of a public-house gave the barman into custody on a charge of stealing whisky from the cellar, it was held that the manager's employer was not liable as there was no evidence that his property could only be protected by means of an immediate arrest.

These cases were all discussed in a recent decision (b) of the Court of Appeal in Ireland. There the plaintiff went to see the defendants' entertainment and took a ticket at the door, paying the ticket-issuer a sovereign and receiving change. Half an hour afterwards the ticket-issuer, who was responsible for the money taken, discovered that his cash was half a sovereign short, and believing that he had given the plaintiff half a sovereign too much, he went and asked him for the half-sovereign. As he got no satisfaction, he brought a policeman and gave the plaintiff into custody. The Court held that the ticket-issuer had no implied authority to have the plaintiff arrested, and that therefore the defendants were not liable. Holmes, L.J., thought that three conditions must co-exist to justify the inference that a servant in the position of the ticket-issuer had implied authority from his employers to arrest: (1) he must act at the time of, or immediately after, the supposed abstraction of the property; (2) it must be shown that before taking action he had no opportunity of consulting his master or his immediate superior; and (3) it must appear that the reasonable and probable result of the arrest would be the recovery of the property if it has been taken.

The same principle was applied (c) in a case where the action was for damages for assault by the defendant's servant. A tramway conductor ran after some boys whom he thought had been riding on the steps of the tram contrary to the tramway company's bye-laws. The conductor caught the plaintiff, who in fact had not been riding on the step, and committed the assault complained of. It was held that the employers were not liable, the assault not having been committed in the course of the conductor's employment nor to protect the employers' property, but simply for the purpose of punishment.

And a master has been held liable for damage done to a third person which would not have happened but for the negligence of the defendant's servant, although the immediate cause of the damage was a stranger.

(a) *Hanson v. Waller*, [1901] 1 K. B. 390. In *Van den Eynde v. Ulster Railway Co.*, I. R. 5 C. L. 328, the defendants were held liable where their station-master detained and searched the plaintiff, who was suspected of attempting to travel by means of a stolen ticket which was the property of the defendant company.

(b) *Cullimore v. Savage South Africa Co.*, [1903] 2 I. R. 589.

(c) *Radley v. London County Council*, 109 L. T. 162.

Thus, a master scavenger was held liable for injury caused by negligence of his servant in leaving his cart and horse unattended in the street, although the immediate cause of the injury was a passer-by who struck the horse, which backed the cart into the plaintiff's shop-window (*d*).

To render the master liable in these cases, it must be shown that the negligence of the servant was, in fact, an effective cause of the injury to the plaintiff.

The defendant (*e*) employed a servant to drive a cart, and the defendant, who had nothing to do with the driving, to go with the cart to deliver parcels to the defendant's customers. On one occasion the driver negligently left the cart in charge of the lad, who drove the cart on and ran into the plaintiff's carriage. It was held that the negligence of the driver was an effective cause of the damage, and to render his employer liable. Lord Esher, M.R., said, the driver "had done what he ought to do, and had thought that it would be the probable result of his going away and leaving the cart in the hands of the lad in it, the inevitable conclusion must be that he would have thought he was doing a dangerous thing"; and leaving the cart in the hands of the lad with the means of driving off at any moment made the driver's negligence an effective cause of what happened afterwards.

A similar conclusion was arrived at in a case (*f*) in which the defendant left a loaded gun near a gap inside a fence along the side of a road, and a boy, seeing the gun, took it up and accidentally shot the plaintiff. The defendant was held liable. Fitzgibbon, J., thought that the test was whether a man of ordinary prudence, having regard to all the circumstances, ought to have anticipated the possibility of injury as a "not improbable" consequence of his action. Lord Walker, L.J., was of opinion that the defendant must be held liable if he had anticipated the reasonable probability that persons, like the young (*g*), the careless, and the inexperienced, who might pass along the highway, might see the gun and meddle with it, and that a boy of fifteen who took it up would use it in that careless or reckless manner in which a boy might.

On the other hand, in a case (*h*) in which the servants of a company left some trucks and a van on a siding on an incline, and in putting on the brake and properly securing the wheels of the trucks, some boys trespassing on the siding loosened the brake and uncoupled the couplings, so that the van ran down the incline and, crossing the highway by a level crossing, knocked down the plaintiff, the servants were held not responsible, on the ground that the servants

(*d*) *Illidge v. Goodwin*, 5 C. & P. 190.

(*e*) *Engelhart v. Farrant & Co.*, [1897] 1 Q. B. 240.

(*f*) *Sullivan v. Creed*, [1904] 2 I. R. 335.

(*g*) *Lynch v. Nurdin*, 1 Q. B. 29, *post*, p. 231.

(*h*) *McDowall v. Great Western Railway Co.*, [1903] 2 K. B. 331.

guilty of negligence in leaving the trucks and van as they did, unless the evidence showed that they ought reasonably to have anticipated (i) what afterwards happened. Vaughan Williams, L.J., said that "in every case in which the circumstances are such that anyone of common sense having the custody of or control over a particular thing would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury." But there was nothing in the circumstances of this case which would induce an ordinary person of common sense and care to do more than the railway company did; and moreover, even if there was neglect on the part of the company, it was not the effective cause of the accident.

Upon similar principles the damages recoverable in respect of a tort are those which are "the direct and natural consequence of the breach of obligation complained of." So when it was alleged that the overcrowding of a railway carriage had caused damage to the plaintiff by occasioning the robbery complained of, it was held that the robbery could not fairly be regarded as the natural consequence of overcrowding the carriage; viewed as damage it was too remote (k).

A manufacturing jeweller hired from a jobmaster a fitted brougham with a horse and driver, for the purpose of carrying round to his customers a traveller with a stock of jewels. From the contract and the circumstances under which it was made the Court drew the inference that the jobmaster undertook to supply a driver, whose duty it was not only to drive, but to take ordinary care of the brougham when the traveller was obliged to leave it. One day when the traveller had gone into a hotel for luncheon, leaving the brougham in the charge of the driver, the driver left it unattended in the street, and while it was so unattended a thief stole the jewels that were inside it. The Court held that the driver's breach of duty in leaving the carriage unattended was the direct cause of loss, and that the jobmaster was responsible to the jeweller (l).

The following cases are instances in which a master has been held to be not responsible for the wrongful act of his servant, because the act complained of was outside the scope of the servant's employment.

A master was held (m) not liable for the act of his housemaid in lighting furze and straw with a view to clean a chimney which smoked, whereby the house was burnt down, as she was merely employed to

(i) *Greenland v. Chaplin*, 5 Ex. 243; *Sharp v. Powell*, L. R. 7 C. P. 253; *Clark v. Chambers*, 3 Q. B. D. 327.

(k) *Cobb v. Great Western Railway Co.*, [1893] 1 Q. B. 459, per Bowen, L.J.

(l) *Abraham v. Bullock*, 86 L. T. Rep. 796; distinguished in *Cheshire v. Bailey*, [1905] 1 K. B. 237, *post*, p. 246.

(m) *M'Kenzie v. M'Leod*, 10 Bing. 385.

light the fire, and others were employed to clean the chimneys; moreover, she had been expressly cautioned not to attempt to clean the chimney in that way; the Court refusing to interfere with the finding of the jury that in acting as she did she was acting outside the scope of her employment, which was merely to light the fire.

And a tramway company was held not responsible for an injury to a passenger on one of their cars, which was due to his having been allowed by the driver to stand upon the front platform of the car, a part not constructed for use by passengers, the permission being given there being outside the scope of the driver's authority (*n*).

Again (*o*), a master was held not liable for an unlawful act committed by his servant, who was authorised to distrain cattle trespassing on his land, in driving the plaintiff's horses, which were on the highway, on to his master's land and then distraining them. Doing so was not within the scope of his authority; and Patte said: "A master is liable where his servant causes injury by a lawful act negligently, but not where he wilfully does an illegal act."

So if a man sends his servant on an errand without providing him with a horse and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is not liable for that act (*p*).

And the proprietors of a sewage farm, of which B. was manager, were held not liable for a trespass upon the land of an adjoining owner committed by B. which he had no express authority from the defendant to commit, although it was done to improve the drainage from the farm and to benefit the neighbourhood (*q*).

The principle upon which these cases were decided is illustrated by the following American case:—

The defendant's servant was driving his waggon and team. The plaintiff's son (a boy on his way to school) asked for a ride. The servant said he might when they got up the hill he was ascending. When the hill was ascended, the lad took hold of the front of the waggon, between the front and hind wheels. The driver did not stop. He was cautioned by a bystander, that if he did so he would kill the boy. He looked behind him. The horses were running, and the driver seeing the plaintiff's son and other boys attempting to get on the waggon, cracked his whip, and put the horses into a gallop. The plaintiff's son fell, and the hind wheel went over and injured him. It was held, that as the driver whipped the horses, intending to put them off, this was a wrong on the part of the servant, for which the defendant was liable.

(*n*) *Byrne v. Londonderry Tramway Co.*, [1902] 2 I. R. 457.

(*o*) *Lyons v. Martin*, 8 A. & E. 512. See *Limpus v. General Omnibus Co.*, 221.

(*p*) *Park, J.*, in *Goodman v. Kennell*, 3 C. & P. 167.

(*q*) *Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575.

master was not liable, any more than he would have been for an assault committed by the servant (*r*).

So, if a master of a ship sign a bill of lading for goods which have never been shipped (*s*); or a wharfinger's servant fraudulently sign a receipt, purporting to be an acknowledgment that certain goods have been delivered at his master's wharf to be shipped, no such goods having in fact been delivered (*t*); neither the wharfinger in one case, nor the shipowner in the other, will be bound by such act of their servant. In neither case was there any actual authority to do the act complained of, nor did the facts warrant the inference of an implied authority.

And if one employ another to do an act which may be done in a lawful manner, but the latter in doing it commit a public nuisance, the employer is not responsible (*u*). Under ordinary circumstances the authority of the agent is limited to that which is lawful. If, in seeking to carry out the purpose of his employment, he oversteps the law, he outruns his authority, and his principal will not be bound by what he does (*x*).

Nor is a master responsible for injury caused by his servant's negligence to a person who might, by the exercise of ordinary care, have avoided the consequences of the servant's negligence (*y*). The law was thus stated by Lord Penzance as being perfectly well settled and beyond dispute (*z*).

"The first proposition is a general one to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of

(*r*) *Wright v. Wilcox*, 19 Wendell's Rep. 343, following *M'Manus v. Crickett*, 1 East, 106. See *Hoffman v. New York Central, &c. Railroad Co.*, 41 Amer. Rep. 337, and reporter's note, p. 340. In that case the conductor kicked off the car a boy who was stealing a ride, and the company were held liable.

(*s*) *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Ex. 330. See the remarks made in the House of Lords on *Grant v. Norway* in *George Whitechurch, Ltd. v. Cavanagh*, [1902] A. C. 117.

(*t*) *Coleman v. Riches*, 16 C. B. 105.

(*u*) *Peachey v. Rowland*, 13 C. B. 182.

(*x*) Per Cockburn, C.J., in *Wilson v. Rankin*, 34 L. J. Q. B. 62; affirmed, L. R. 1 Q. B. 162; 35 L. J. Q. B. 87. See also *Earle v. Rowcroft*, 8 East, 133, 139.

(*y*) So, *e converso*, a master cannot recover against a third person for damage which has arisen through his own servant's negligence: *Pardington v. South Wales Railway Co.*, 1 H. & N. 392; *Ellis v. London and South Western Railway Co.*, 2 H. & N. 424.

(*z*) *Radley v. London and North Western Railway Co.*, 1 App. Cas. 754. As to the nature of the evidence to be given where contributory negligence is pleaded, see *Wakelin v. London and South Western Railway Co.*, 12 App. Cas. 41, and *Smith v. South Eastern Railway Co.*, [1896] 1 Q. B. 178, and cases there cited.

ordinary care and diligence, have avoided the mischief which ha the plaintiff's negligence will not excuse him."

Therefore, in an action (a) by a passenger in the train of one company against another company, with a train belonging to collision had taken place, whereby the plaintiff was injured, a the defendants, that the injury was caused in part by the negli the persons who had the care of the train in which the plain riding, was held bad, as it was consistent with all the facts s it that the plaintiff, or those who had the charge of the train i he was riding, could not by the exercise of ordinary care have the consequences of the defendant's negligence. And Lord W dale said: "The rule of law is laid down with perfect cor in the case of *Butterfield v. Forrester* (b); and that rule i although there may have been negligence on the part of the p yet, unless he might by the exercise of ordinary care have avoi consequences of the defendant's negligence, he is entitled to r if by ordinary care he might have avoided them, he is the au his own wrong."

The same principle was again acted upon in a case (c) in v master was held liable for the negligence of his waggoner, w driven over and killed the plaintiff's ass, which was wrongfu fettered in the public road; for although the plaintiff was negli leaving his donkey there, yet the driver might, by proper car avoided injuring the animal.

And in the case of *Tuff v. Warman* (d), in the Exchequer Ch Wightman, J., in delivering judgment, said: "The proper q for the jury in cases of this kind is, whether the dama occasioned entirely by the negligence or improper conduct defendant, or whether the plaintiff himself so far contributed misfortune by his own negligence or want of ordinary and c care and caution, that but for such negligence or want of o care and caution on his part the misfortune would not have hap In the first case, the plaintiff would be entitled to recover; latter, not; as, but for his own fault, the misfortune would no happened. Mere negligence, or want of ordinary care or c would not, however, disentitle him to recover, unless it wa that, but for that negligence or want of ordinary care and cauti misfortune could not have happened; nor if the defendant mi the exercise of care on his part have avoided the consequ the neglect or carelessness of the plaintiff. This appears to be th

(a) *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; acc. in *Center v. Finney*, 17 Barbour's Rep. 95.

(b) 11 East, 60.

(c) *Davies v. Mann*, 10 M. & W. 546; see also *Morrison v. General Navigation Co.*, 8 Ex. 733; *Dowell v. Same Co.*, 5 E. & B. 195.

(d) 5 C. B. (N. S.) 573.

deducible from the opinion of the judges in the cases of *Butterfield v. Forrester* (11 East, 60); *Bridge v. The Grand Junction Railway Co.* (3 M. & W. 246); *Davies v. Mann* (10 M. & W. 548), and *Dowell v. The General Steam Navigation Co.* (5 E. & B. 206).''

The principles of the law of contributory negligence were at one time extended in a way which was the subject of much adverse criticism. It was held (e) that a passenger in a public conveyance so far identified himself with the owner of the conveyance and his servants that in an action by him in respect of personal injuries alleged to have been caused by the negligence of a third person, the defendant was entitled to rely on any negligence on the part of the owner of the conveyance, or his servants, which contributed to the happening of the accident. In 1888 the point came up for the consideration of the House of Lords. A collision occurred between two steamships through the fault or default of the masters and crews of both. Two persons on board one of the ships, neither of whom had anything to do with the negligent navigation, were drowned. It was held (f), overruling the two cases just referred to, that the deceased persons were not so identified in respect of negligence with those navigating the ship that they had been on, as to disentitle their representatives from recovering in an action against the owners of the other ship.

In that case, as in the two decisions which it overruled, the injured persons were adults, and on that ground there may be a distinction between those cases and cases where the injured person is an infant; as where the plaintiff, a child five years old, being on a railway in the care of his grandmother, was knocked down and injured by a train of the defendants. The accident was partly due to the defendants' negligence and partly to the negligence of the grandmother, and it was held by the Court of Queen's Bench and affirmed by the Exchequer Chamber, that the plaintiff was so far identified with his grandmother that her contributory negligence prevented his recovering any damages from the defendants (g).

A child or person under age may, according to the circumstances of a case, be guilty of contributory negligence. Where the party injured was a child incapable of taking care of itself, and was not under the care of anyone who was capable of taking care of it, a master has been held liable for injury caused to the child by the negligence of his servant, although the child itself, by its own act, brought about the accident. Thus, where (h) a carman, who had charge of a cart, went

(e) *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire and Yorkshire Railway Co.*, L. R. 10 Ex. 47.

(f) *Mills v. Armstrong; The Bernina*, 13 App. Cas. 1.

(g) *Waite v. North Eastern Railway Co.*, E. B. & E. 719.

(h) *Lynch v. Nurdin*, 1 Q. B. 29; *Lay v. Midland Railway Co.*, 34 L. T. 30. But see *Lygo v. Newbold*, 9 Ex. 302. In *Abbott v. Macfie*, 2 H. & C. 744, a child

into a house in Compton Street, Soho, and left the horse standing at the door, without anyone to take care of them, for half an hour, and during his absence a child, under seven years of age, got upon it, and another boy led the horse on, whereby the child was thrown down, run over, and his leg broken; it was held that the carman's master was liable for the damages sustained by the child, although the child was a trespasser and contributed to the mischief by his own act; the jury having found that he merely indulged the natural instinct of a child in amusing himself with the empty cart, and the deserted horse. The carelessness of the defendant's servant was the real cause of the mischief and the child's misconduct "bore a small proportion to that of the defendant which produced it."

The difficulty, however, which arises in cases of this sort is not so much in ascertaining the law as in applying it to the circumstances of each particular case, and ascertaining who is to be regarded as the master in each case, for it is obvious that the liability arising from the relationship of master and servant cannot exist unless the relationship itself exist. In the first place, the employer of the servant is the master in whose service he is retained, although the servant is not the immediate employ or under the superintendence of the master, as, for instance, if the owner of a ship appoints the master, and directs the master to appoint and select the crew, the crew thus appointed are the servants of the owner; and it has been held that a firm which manages various shipping lines and also held shares in the same are not the employers of pursers employed on the ships. The employers were the shipowners. The firm engaged but did not employ servants in question (i). And if the owner of a farm appoints a bailiff, who is to hire servants and manage the farm, the servants are in fact hired by the bailiff under this arrangement are the servants of the owner of the farm (k). And persons appointed by the superintendent of a local board would be the servants of the local board, just as a guard or porter on a railway is the servant of the company, although appointed by the manager or secretary (l). So too, in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays the wages on behalf of the owner. These under-workmen then become

was held guilty of contributory negligence so as to exempt the defendant from liability. See also *Mangan v. Atterton*, L. R. 1 Ex. 239; which, however, adversely commented on in *Clark v. Chambers*, 3 Q. B. D. 327. *Crocker v. Jackson*, 4 T. L. R. 324, was an action by a girl of seventeen who was injured while working at a dangerous machine for the defendants through having omitted to put on a mask provided for her. The Court held it was not negligence "for a girl of her age to have omitted to put on the mask on the occasion when the accident happened."

(i) *Re Jones; Williams v. Attorney-General*, 106 L. T. 941.

(k) *R. v. Hoseason*, 14 East, 605.

(l) *Foreman v. Mayor, &c., of Canterbury*, L. R. 6 Q. B. 214, per Blackburn J. at p. 219.

immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer (*m*).

The defendant and D. were partners in the business of public carriers from London to Gosport. In an action for damage done to the plaintiff's house by the negligence of the driver of a waggon used in the business, it was held that the fact that the driver in question was hired and paid by D. alone afforded no defence to the defendant (*n*).

And where a firm of potters engaged workmen to work in their manufactory for a year at daily wages, and on the same day engaged R. to work for them by piecework for the same period, and the work which the workmen had to do was in fact included in the piecework of R., and R. paid the workmen's wages out of the amount paid to him by the firm for piecework, it was held that the workmen were the servants of the firm, so as to be liable to conviction, under the statute (since repealed) of 4 *Geo. IV* c. 34, for leaving their employment (*o*).

A corn factor being away from his shop, his sister, who managed his business in his absence, employed a man who occasionally worked for her brother to take some corn to a customer. This man at the time of such employment was in a state of inebriety. Contrary to the practice of the corn factor's shop, he took out the corn on a small warehouse truck which he negligently left on the road, whereby a person driving along in a chaise was injured. The corn factor was held liable at the suit of this person on the ground that the employment of a tipsy man was an act of negligence (*p*).

The question who is the master of a servant who has committed a wrongful act in the course of his employment is more difficult in those cases where the master of a servant has lent or let out his servant to another person for a specific purpose or time. In these cases the law does not recognise a several liability in two principals who are unconnected. Two persons may be jointly liable as masters, but not separately. So that if they are unconnected, it follows that if one is liable the other is not (*q*). It is therefore most important to ascertain whose servant the person was who caused the injury. The answer to that depends upon the question who had the right of control (*r*) over the servant at the time when he did the act which caused the injury.

(*m*) *Laugher v. Pointer*, 5 B. & C. 547, per Littledale, J.; and see per Mullett, J., in the American case of *Blake v. Ferris*, 1 Seld. Rep. 48; *Stone v. Cartwright*, 6 T. R. 411.

(*n*) *Weyland v. Elkins*, Holt, N. P. 227.

(*o*) *Willett v. Boote*, 6 H. & N. 26.

(*p*) *Wanstall v. Pooley*, 6 Cl. & F. 910, note.

(*q*) *Laugher v. Pointer*, 5 B. & C. 547; *Reedie v. London and North Western Railway Co.*, 4 Ex. 244.

(*r*) The control which an agent exercises on behalf of his principal over the servants employed by his principal will not necessarily make him responsible for the acts of those servants: *Stone v. Cartwright*, 6 T. R. 411 (agent of a colliery not liable for damage caused by miners); *Kinsella v. Hamilton*, 26 L. R. Ir. 671 (land agent directing a distress made for landlord, not master of bailiff).

As has already been pointed out, the question is one of fact determined on the circumstances of each particular case (s). A master in some cases the general master of a servant whom he has let to another person has been held to have parted with the control of the servant with regard to a particular operation, so as to be relieved from liability for the servant's negligence in that operation (t), and in some cases the facts have justified the finding that the general master had not so parted with the control of his servant (u). Where a master has entered into a written contract for letting out his servant on a particular occasion, the terms of the contract (x), as construed by the Court, will often show whether it was the general master or the particular master of the servant who had such a right of control over the servant during the time for which his services were hired as to make him liable for the negligence of the servant in the course of the employment. In *Donovan v. Laing Wharfton Nursing Association*, the plaintiff supplied him with a nurse to attend upon his wife, who was about to undergo an operation. By the negligence of the nurse the patient was injured and an action was brought against the nursing association. It was held that the question of the defendants' liability depended upon the effect of the contract with the plaintiff. If they undertook to nurse the patient, they would be liable for the negligence of the nurse whom they supplied. If, on the other hand, they only contracted to supply a competent nurse and used ordinary care and skill in selecting the nurse whom they supplied, then they would not be responsible for her negligence. It was held upon the construction of the contract that this was all that the defendants had agreed to do, and that in nursing the patient the relation of master and servant did not exist between the defendants and the nurse so as to make them liable for her negligence. Similarly the contract of a hospital in respect of an operation is to nurse during the operation but to supply nurses and other attendants whose selection they have taken due care. Such nurses and attendants are, for the time being, under the control of the operating surgeon and not of the hospital authorities. It was accordingly held that an action for injuries alleged to have been caused to a patient by the negligence of some of the hospital staff during an operation was not maintainable (z).

If there is no written contract, the nature of the work to be

(s) *Ante*, p. 150.

(t) *Murray v. Currie*, L. R. 6 C. P. 24 (seamen lent by shipowner to stave *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205 (engine and engineer lent to colliery owners to contractor for sinking shaft); *Donovan v. Laing Wharfton Syndicate*, [1893] 1 Q. B. 629 (crane and craneman lent to wharfinger).

(u) *Cairns v. Clyde Navigation Trustees*, 25 Rettie, 1021 (crane and crane lent to stevedores); *Union Steamship Co. v. Claridge*, [1894] A. C. 185 (winc at ship's hatch under control of shipowners, not of stevedores).

(x) *Waldock v. Winfield*, [1901] 2 K. B. 596.

(y) *Hall v. Lees*, [1904] 2 K. B. 602.

(z) *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K. B. 82

will probably afford evidence from which an inference may be drawn, which of the two, the general master or the hirer, had the right of control.

A *primâ facie* presumption of the right of control may sometimes be raised by other circumstances, such as in a case where the defendant was the registered owner of a ship, and it was held that there was accordingly *primâ facie* evidence from which a jury may infer that he was the employer of a man in charge of the ship while lying in a dock (a). But it has been held that the registered managing owner of a ship who by charterparty has parted with the whole possession and control of the vessel was not rendered liable for the negligence of the master of the ship by reason of the provisions of the Merchant Shipping Act, 1876 (b), and the defendant, who was owner of a traction engine to which his name and address were affixed was held not liable to a person injured through the negligent management of the engine by the person to whom it had been hired out by the defendant (c). An offer by the defendant to pay the expenses caused by the negligence of X. is not evidence that X. was his servant (d).

The letting out of carriages and drivers has supplied some of the chief instances in which this question of the right of control has arisen. For instance, in the ordinary case of a person hiring a carriage, horses and driver (e), on a job, although it is now settled that, if in such a case any accident or injury happen to a third person through the carelessness or misconduct of the driver, the hirer is not, in general (f), liable to make compensation for such injury, yet there was formerly considerable doubt upon the subject, and some of the judges expressed opinions that the hirer was responsible, as being the *dominus pro tempore* (g); and he certainly is, in some respects, the master, for he may order the carriage to be driven where he pleases. The question was argued at great length in *Laugher v. Pointer* (h), where the owner

(a) *Hibbs v. Ross*, L. R. 1 Q. B. 534; *Lopes, L.J.*, in *Baumvöll Manufactur von Scheibler v. Gilchrest & Co.*, [1892] 1 Q. B. 253.

(b) *Baumvöll Manufactur von Carl Scheibler v. Furness*, [1893] A. C. 8. As in the case of metropolitan cab proprietors and cab drivers, *ante*, p. 211, an Act of Parliament may have the effect of making a person responsible for the acts of another who is not his servant, as though they stood in the relation of master and servant.

(c) *Smith v. Bailey*, [1891] 2 Q. B. 403, disapproving of *Stables v. Eley*, 1 C. & P. 614.

(d) *Powell v. McGlynn*, [1902] 2 I. R. 154.

(e) If the horses are driven by the servant of the hirer he would be liable: *Sammell v. Wright*, 5 Esp. 263.

(f) The hirer may make himself liable by ordering, sanctioning, or adopting the act of the driver: *M'Laughlin v. Pryor*, 4 M. & G. 48, *post*, p. 249; *Burgess v. Gray*, 1 C. B. 578, *post*, p. 240.

(g) See per Heath, J., in *Bush v. Steinman*, 1 B. & P. 409. Where A. hired B.'s servant to thatch for him, with B.'s assent, B. was held liable for negligence of the servant. But semble, he was not for incompetence: *Holmes v. Onion*, 2 C. B. (N. S.) 790.

(h) 5 B. & C. 547. And see *Chilcot v. Bromley*, 12 Ves. 114, where Sir W. Grant held that a job coachman supplied with carriage and horses was not a servant of the person to whom they were supplied, and so not entitled under a general

of a carriage hired for the day, of a livery-stable keeper, a pair of horses and a driver, through whose negligence an injury was done to the plaintiff's horse; and the question was, whether the owner of the carriage, or the livery-stable keeper who supplied the horses and driver, was liable to make compensation for the injury. The judges before whom the case was argued differing in opinion, they all gave separate and very elaborate judgments, which, as observed by Justice Story, in his valuable work on Agency (i), "have exhausted the whole prior learning on the subject, and on that account should be attentively studied." The Lord Chief Justice, afterwards Lord Tenterden, and Mr. Justice Littledale, held that the owner of the carriage was not liable; and Bayley and Holroyd, JJ., held that he was. The point was thus left unsettled, for not only the Court of Queen's Bench but the twelve judges differed upon it (k). It was not until 1840, when the case of *Quarman v. Burnett* (l), in which the Court of Exchequer, after fully considering the judgments given in *Laugher v. Pointer*, thought the weight of authority and legal principle was in favour of the view taken by Lord Tenterden and Mr. Justice Littledale, and decided accordingly, that the hirer of the horse and driver was not liable. And it was also held, that the facts that the hirer always had the same driver, who was the only one he kept, and always gave him a fixed gratuity and provided him with a livery, which he kept in the hirer's hall, and while he was hanging in which the accident happened, made no difference in the liability.

The decision in *Quarman v. Burnett* was followed (m) in a case where the plaintiff had been injured by the negligent driving of a water cart which was being used for watering the streets of Liverpool. The action was brought against the corporation of Liverpool, who had made arrangements with a contractor to supply the driver and horses for their watering carts. It appeared that the driver was paid by the contractor, and was not under the control of the corporation or

bequest to servants, although he paid the coachman board wages, as the coachman was with the job-master, and the coachman was a *subject* of the contract, and not a *party* to it.

(i) Sect. 453 b.

(k) See *per* Lord Wensleydale, in *Quarman v. Burnett*, 6 M. & W. 507; *Brady v. Giles*, 1 M. & Rob. 494, where a similar question arose in an action for negligence. Lord Abinger, C.B., left it to the jury to say whether the postillions acting as the servants of the owner of the chaise, or of the hirer, and said it appeared to him that the Queen's Bench pursued an erroneous course in *Laugher v. Pointer*, when they allowed the question to be discussed as a question of law. See *M'Laughlin v. Pryor*, 4 M. & G. 48, *post*, p. 249.

(l) 6 M. & W. 499. And see *Fenton v. City of Dublin Steam Packet Co.*, 8 E. 835, where the owner of a ship, who let it by charterparty, whereby he was to find seamen, was held liable for their negligence; and *Dean v. Hogg*, 10 E. 345; *Dalyell v. Tyrer*, 28 L. J. Q. B. 52.

(m) *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890. The *dictum* of Groves J. in this case that the liability would have been different if the servant had not been lent for reward was disapproved of by the Court of Appeal in *Donovan v. Wharton and Down Construction Syndicate*, [1893] 1 Q. B. 629.

wise than that their inspector told him what streets to water, and on this ground the corporation were held not to be liable for the driver's negligence.

But where (n) the owner of a carriage, horses and harness, was supplied with a driver by a livery-stable keeper, and provided his own livery for the driver, who had driven for him continuously for six weeks, it was held that there was evidence for the jury that on the occasion when the accident happened to the plaintiff, which was the cause of the action, the driver was acting as the servant, not of the livery-stable keeper, but of the owner of the carriage.

And "ever since *Quarman v. Burnett* it has been considered settled law that one employing another is not liable for his collateral (o) negligence unless the relation of master and servant existed between them, so that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants" (p). Here also the power of control retained by the employer is the point on which will mainly turn the question whether the person employed is a servant or an independent contractor.

A stevedore is ordinarily an independent contractor for loading or unloading a vessel, and, apart from the consideration of any special contract between the owner and the charterer, he is not the servant of the owner, and the negligence of a labourer employed by him, though one of the ship's crew, will not render the owner responsible (q).

A labourer, particularly skilful in making drains, who was employed to cleanse a drain for the defendant, who paid him five shillings for the job, was held not to be a contractor, and the defendant was held liable for injuries caused through the labourer's negligence (r).

But a skilled plumber called in by a landlord to mend a leaky

(n) *Jones v. Scullard*, [1898] 2 Q. B. 565.

(o) Sometimes called "casual" negligence: *Pickard v. Smith*, 10 C. B. (N. S.) 470. In *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335, Lindley, L.J., refers as an instance of casual negligence to *Reedie v. London and North Western Railway Co.*, 4 Ex. 244, where the defendants employed a contractor to build a bridge, and one of the contractor's workmen carelessly let a stone fall on the plaintiff, and the defendants were held not liable. See *Pearson v. Cox*, 2 C. P. D. 369. See also as to the meaning of casual or collateral negligence the judgment of Smith, L.J., in *Penny v. Wimbledon Urban District Council*, [1899] 2 Q. B. 72.

(p) *Dalton v. Angus*, 6 App. Cas. 740, per Lord Blackburn at p. 829. This general statement is subject to other principles of law: see *post*, p. 239.

(q) *Murray v. Currie*, L. R. 6 C. P. 24. In questions arising between a shipowner and charterer a stevedore may sometimes under the charterparty be considered the owner's servant: *Sack v. Ford*, 13 C. B. (N. S.) 90; *Harris v. Best*, 68 L. T. 76. But the master of a general ship has been held not liable to the owner of goods for the damage done to them by the careless stowage of a stevedore appointed by the charterer, but paid by and to act under the captain's orders, the stevedore not being the servant of the master; though the master might make himself liable for the stevedore's acts by interfering: *Blaikie v. Stenbridge*, 6 C. B. (N. S.) 894.

(r) *Sadler v. Henlock*, 4 E. & B. 570. In *Serendat v. Saisse*, L. R. 1 P. C. 152, the defendant employed two hands of Indians to clear his ground of weeds and brushwood. By their negligence a fire kindled by them spread to the plaintiff's land and burnt his house. It was proved in evidence that the defendant interfered with the work, and directed the Indians as to the mode in which it was to be performed, and he was accordingly held responsible for their negligence.

cistern was held to be an independent contractor for whose negligence the landlord was not liable to a tenant who was injured thereby (i).

Thus, too, where a butcher bought a bullock in Smithfield Market and employed a licensed drover to drive it home, and the drover employed a boy, through whose negligence the bullock injured plaintiff's property; it was held, that the butcher was not liable, as the drover exercised a distinct calling, and the boy who caused mischief was his servant, not the servant of the butcher (t). And where a builder was employed to make certain alterations at a house, including the preparation and fixing of certain gas-fittings, to do which he made a sub-contract with a gas-fitter, through the negligence of whom, or his servants, the gas exploded and injured plaintiff, the builder was held not liable, as the relation of master and servant did not exist between him and the party causing the injury (u). For redress the plaintiff must look to the sub-contractor.

But though it is the employer's power of control that differentiates the position of servant from that of independent contractor, the employer may nevertheless reserve to himself by contract general rights of watching the progress of the works which the contractor agreed to carry out for him, of deciding as to the quality of materials and workmanship, of stopping the works or any part thereof at stage, and modifying and altering them, and of dismissing disobedient or incompetent workmen employed by the contractor, and yet he is not thereby of necessity rendered himself liable to third persons for negligence of the contractor in carrying out the works (x).

A shipowner employing a stevedore for the discharge of a vessel retains certain rights of control in respect of certain incidents in that operation, but the master of the vessel has not the servants of the stevedore under his control and at his disposition so as to make them servants of the shipowner (y).

So again, commissioners of a navigation, who had entered into contract with a person to do certain works, were held not liable for an injury arising from the imperfect performance of part of the works, as the contractor was not their servant (z).

(s) *Blake v. Woolf*, [1898] 2 Q. B. 426.

(t) *Milligan v. Wedge*, 12 A. & E. 737. In this case, Littledale, J., states that he retained the opinion he had expressed in *Laughner v. Pointer* (*ante*, p. 233). *Martin v. Temperley*, 4 Q. B. 298. And see *R. v. Hey*, 2 Carr. & K. 983, where it was held that a drover was a bailee, and not a mere servant of the person who employed him.

(u) *Rapson v. Cubitt*, 9 M. & W. 710; *Parry v. Smith*, 4 C. P. D. 325. *Gayford v. Nicholls*, 9 Ex. 702. In *M'Keon v. Bolton*, 1 Ir. C. L. Rep. 377, a person employed to remove dust was held to be a servant, and not a contractor, and the employer was held liable for an accident caused by a heap left in the street.

(x) *Reedie v. London and North Western Railway Co.*, 4 Ex. 244; *Steel v. Eastern Railway Co.*, 16 C. B. 550; *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; *Glover v. London and North Western Railway Co.*, 5 Ex. 66.

(y) *Cameron v. Nystrom*, [1893] A. C. 308.

(z) *Allen v. Hayward*, 7 Q. B. 960; and see the American cases of *Lowell v. I. and Lowell Railroad Corporation*, 23 Pick. 24; *Stone v. Cheshire Railroad Corporation*, 19 New Hamps. Rep. 427; *Blake v. Ferris*, 1 Seld. 49, 62 (1851); *Hillia*

So in another case (*a*), where a railway company entered into a contract with A. to construct a portion of their line, A. contracted with B., who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant and as a surveyor, and had the management of B.'s business in London, for which he received an annual salary. B. entered into a contract with C., by which C. agreed for £40 to erect a scaffold, which had become necessary in building the bridge; but it was agreed that B. was to provide the requisite materials, and lamps, and other lights. The scaffold was erected upon the footway by C.'s workmen, and a portion of it improperly projected, and owing to that and the want of sufficient light, D. fell over it at night and was injured; but it was held that D. could not maintain an action against B. for the injury thus occasioned; even though, after the accident, B. had caused other lights to be placed near the spot to prevent a recurrence of similar accidents.

Again, where certain commissioners (*b*) had contracted with A. for all the paving required in a certain district, and A. contracted with B. to lay down a certain portion of it, and B.'s workmen left some paving stones at night in such a position as to constitute a public nuisance, and the plaintiff tumbled over them whilst on foot; it was held, that A. was not liable to an action at the suit of the plaintiff, as the injury was not caused by his workmen.

No general rule can be laid down as to the liability of a vessel in tow for a collision between it and a third vessel occasioned by the negligence of those on board the tug. Whether the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, so to make the former liable, depends on the circumstances of the case (*c*).

It would seem that, according to the law of Spain, where a servant commits a wrongful act, the wrong is not imputed to the master, and therefore where a British ship damaged a pier in Spain, it was held that the owners could not be rendered liable by the application of the principles of English law; James, L.J., observing, "If I take my coachman to France and he in driving my carriage injures a carriage in France I do not take with me the law of *respondeat superior* so as to make me liable" (*d*).

The general rule being that a person employing an independent contractor is not liable for the negligence of that contractor or his servants, reference may now be made to cases in which the negligence

Richardson, 3 Gray, 349 (1855), in the last of which are two elaborate judgments. *Kelly v. Mayor of New York*, 1 Kernan, 432 (1854).

(*a*) *Knight v. Fox*, 5 Ex. 721.

(*b*) *Overton v. Freeman*, 11 C. B. 867.

(*c*) *The Quickstep*, 15 P. D. 196. Where there was a pilot on board the tow, and the tug collided with another vessel, the tug was held liable: *The Mary*, 5 P. Div. 14. See the American case of *Sproul v. Hemmingway*, 14 Pick. 71.

(*d*) *The Mozham*, 1 P. Div. 107.

of such a contractor or his servants will impose a liability on his employer.

In the first place if the act contracted to be done be in itself unlawful, the employer will not escape liability by agreeing with someone to do it for him. As where the defendants, without having any power or authority to break up streets, employed contractors to do it for the purpose of laying down gaspipes, and the plaintiff fell over a heap of stones left by the contractors and hurt herself, the defendants were held liable (e).

Again, the employer may, by personal interference with the workmen, adopt their acts and so render himself liable where, ordinarily, he would not be so. As in the case of *Burgess v. Gray* (f), in which it appeared that the defendant was the proprietor of some newly-built houses which he had employed P. to build for him, and P. in forming a drain from premises belonging to the defendant at the back of the new houses to the common sewer, had, by his servants, caused a quantity of gravel to be deposited by the roadside. The drain being finished, P. employed a person to carry away the gravel, and paid him so much a load, which he charged to the defendant, but the person so employed left some on the road, and the plaintiff, whilst driving along the road in the evening, ran upon the gravel left in the road, was upset and was injured. The defendant's attention had been called to the gravel left in the road by a policeman, and he had promised to remove it as soon as he could, and after the accident had said it was caused by the plaintiff's carelessness. On the part of the defendant, it was, amongst other things, contended, on the principle of *Quarman v. Burnett*, that he was not liable, as he had employed a contractor; but it was nevertheless held that, under the circumstances of the case, he was liable.

In that case no precise contract for the work was proved, nor was it shown that P. was employed to do the work personally, the mode of doing it being left to his judgment and discretion. And in the absence of evidence to show that the defendant had parted with all control and authority in the matter, "it must be assumed," said Cresswell, J., "that he adopted all that was done by P. in carrying on the work."

And again, an employer cannot, by employing a contractor, get rid of his own duties towards other people, whatever those duties may be.

(e) *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767. See *Sadler v. Henlock*, 4 E. & B. 570; *Blake v. Thirst*, 32 L. J. Ex. 188. In *Pickard v. Smith*, 10 C. B. (N. S.) 470, it is said that the rule as to the non-liability of an employer for the acts of an independent contractor is inapplicable to cases "in which the act which occasions the injury is one which the contractor was employed to do."

(f) 1 C. B. 578. The defendant in this case was held liable partly on the ground that it did not appear that he had parted with the whole control of the work, and partly on the ground that he had sanctioned and adopted the act of the person who placed the gravel in the road. It is on the latter account that it is cited in the text. See, however, *Knight v. Fox*, 5 Ex. 721, *ante*, and see also the cases of trespass, *post*.

In a case already referred to (*g*), Lord Blackburn used these words: "Ever since *Quarman v. Burnett*, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

A duty on the employer which he cannot get rid of by contracting for its performance by some one else may be one imposed directly by statute. As where (*h*) a statute imposed on the defendants the duty of building a bridge which would open to let vessels pass, and they employed a contractor who built a bridge that would not open as the statute required, whereby the plaintiff was injured, the defendants were held liable. So, too, where a statute authorised the owner of a house to make a cutting in a road for the purpose of making a drain and by a subsequent section imposed on him the duty of filling up the cutting properly, and he employed a contractor to make the drain, whose workmen neglected to fill up the cutting properly, the owner of the house was held liable (*i*). And where the statutory duty was imposed on a railway company of making good all damage done to a road which they might "use or interfere with" in making a railway, they were held liable for damage done by the contractor whom they employed (*ii*).

Other instances of duties from which an employer of a contractor cannot free himself are those which he owes to persons lawfully passing along a highway, or a place which may be, and to his knowledge probably will be, used by persons lawfully entitled so to do (*k*).

Thus (*l*) the occupier of the refreshment room at a railway station was held liable for an injury caused by the trap of his coal-cellar being negligently left open by the servants of the coal merchant who had been delivering coal there.

(*g*) *Dalton v. Angus*, 6 App. Cas. 740, 829.

(*h*) *Hole v. Sittingbourne and Sheerness Railway Co.*, 6 H. & N. 488.

(*i*) *Gray v. Pullen*, 5 B. & S. 970.

(*ii*) *West Riding and Grimsby Railway Co. v. Wakefield Local Board*, 33 L. J. M. C. 174.

(*k*) Under the Tramways Act, 1870 (33 & 34 Vict. c. 78), a tramway company can by contract with the road authority relieve itself from liability for injuries from non-repair of that portion of the road which otherwise they would be liable to repair. *Aldred v. West Metropolitan Trams. Co.*, [1891] 2 Q. B. 398.

(*l*) *Pickard v. Smith*, 10 C. B. (N. S.) 470. See also *Wilson v. Hodgson's Kingston Brewery Co.*, 113 L. T. 1112. Compare *Whiteley v. Pepper*, 2 Q. B. D. 276, where the coal merchant was held liable.

So a person maintaining a lamp projecting over a highway for own purposes is bound to maintain it so as not to be dangerous to passengers, and if it causes injury owing to want of repair it is answer on his part that he employed a competent person to put it in a safe state of repair (*m*).

And a person interfering, though under statutory authority, with a highway, is under the duty of taking care that what is being done on the highway shall offer no dangerous obstruction to the public. A district council (*n*) employed a contractor to make up a road, and in carrying out the work, he negligently left on the road a heap of unlighted and unprotected. A person walking along the road at dark fell over the heap and was injured, and it was held that the council was liable because, from the nature of the work which it had employed the contractor to do, danger was likely to arise to the public using the road. So, too, it was held (*o*) that a district council in making a sewer under a road were bound to take proper precautions against doing injury to any gas pipes which they might come across while excavating, and therefore were held liable for damages resulting from an escape of gas from a pipe which the contractor, whom the council employed to make the sewer, had negligently omitted to properly support during the excavations, so that it broke and gas escaped.

In another case (*p*) a company was laying telephone wires underneath the pavement of a street and contracted with a plumber to solder the joints of the pipes in which the wires were laid. To do this the soldering material was melted in an iron pot used on the pavement and in accordance with a common and proper practice a benzine lamp was dipped into the molten metal for the purpose of getting a flare. In consequence of the negligent way in which this was done an explosion ensued and the plaintiff, who was passing along the highway, was injured. The district council was held liable, as it was bound to take care that the public using the highway should be protected against any act of negligence by a person acting for it in the execution of the works.

On the other hand, where the defendant brewery company employed a contractor to deliver beer at a public-house kept by the joint defendant, and the latter opened the cellar flaps in the pavement so as to get the beer into his cellar and left the opening unguarded so that the plaintiff when walking upon the highway in the dark tripped up and fell into the cellar, it was held that the brewery company were not liable (although the public-house proprietor claimed to be liable).

(*m*) *Tarry v. Ashton*, 1 Q. B. D. 314.

(*n*) *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72, followed in *H. Tottenham Urban Council*, 79 L. T. 495.

(*o*) *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335.

(*p*) *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392.

was). The contractor was not employed by them to do work dangerous to the public or interfering with the surface of the highway (*q*).

The defendants' barge was sunk in the Thames, and the contractor employed by them to raise the barge negligently allowed the guard vessel placed to mark the submerged barge to swing out of position, so that the plaintiff's ship ran on the wreck and was damaged. The Thames, it was held, was undoubtedly a highway and the case fell within the principle in *Penny v. Wimbledon Urban Council*, so that the defendants were liable (*r*).

Those were cases in which the person injured was lawfully using a public highway, but the two following cases show how difficult it is for a person who contracts for the execution of any works of a kind likely to cause injury to his neighbour, to avoid liability for their careless execution.

In *Hughes v. Percival* (*s*) the defendant employed a contractor to take down his house and rebuild it. In doing this the contractor negligently cut into the party-wall between the defendant's house and the adjoining house of B., and this caused the defendant's house to fall and do damage to the plaintiff's house. There was no question whether the plaintiff had any right of support from the defendant's house. It was held that the defendant was liable, upon the ground that the work ordered by him was necessarily attended with risk to the plaintiff's house, and that it was therefore the defendant's duty to see that proper precautions were taken to prevent injury to that house.

In a subsequent case (*t*) the defendants, who were landowners, contracted with a man to fell and to burn the bush on their property, and they made certain stipulations as to the time when the burning was to take place. The contractor disregarded these stipulations and negligently made a fire which spread to the plaintiff's land and injured his buildings and crops. The Privy Council held the defendants liable for the negligence of their contractor, and Lord Shand, who delivered the judgment, after saying that the lighting of a fire on open bush land is an operation necessarily attended with great danger, and that a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property, said that if the proprietor "authorises another to act for him he is bound, not only to stipulate that such precautions shall be

(*q*) *Wilson v. Hodgson's Kingston Brewery Co., Ltd.*, 85 L. J. K. B. 270.

(*r*) *The Snark*, [1900] P. 105.

(*s*) *Hughes v. Percival*, 8 App. Cas. 443, overruling *Butler v. Hunter*, 7 H. & N. 826. See also the following cases, where the plaintiff had a right of support to his land or to his buildings, and the defendant was held liable for the acts of his contractor by which the plaintiff's right was interfered with: *Le Maitre v. Davis*, 19 Ch. D. 281; *Bower v. Peate*, 1 Q. B. D. 321; *Dalton v. Angus*, 6 App. Cas. 740

(*t*) *Black v. Christchurch Finance Co.*, [1894] A. C. 48.

taken, but also to see that these are observed, otherwise he will be responsible for the consequences."

This liability of the master for the act of his servant, however, presupposes and is founded upon some obligation binding upon the master, either by contract or otherwise, to do or abstain from doing the act, the not doing or doing of which is complained of. A master cannot be liable for his servant omitting to do an act unless he himself was bound to do it. Nor again, can a master be liable for his servant doing an act when the master would not be liable if he did it himself.

Where the plaintiff, who was an officer in the army, being about to leave London, sent his trunk to the house of the defendant (who was an upholsterer) for safe custody, and agreed to pay one shilling per week for house-room, and when the plaintiff returned he received the trunk, but the whole of the contents had been taken out and stolen, and the plaintiff brought an action against the defendant, charging him as bailee; Lord Kenyon held that the action could not be supported when it appeared that he had taken as much care of the plaintiff's goods as he had of his own, and said, "To support an action of this nature positive negligence must be proved. It has appeared in evidence in this case that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do; and if such goods are stolen by the defendant's own servants that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own (u)."

Where a customer deposited with his bankers for safe keeping certain securities which were stolen by a clerk of the bankers, it was held by the Privy Council that the bankers, as gratuitous bailees, were not liable unless the loss was occasioned by their gross negligence (x), and that under the circumstances there was no evidence of negligence (y).

A trustee who, without being guilty of negligence, gives to his servant the custody of trust property, is not liable for loss occasioned to the trust estate by the felonious acts of the servant (z).

At common law an innkeeper is bound to keep safely the goods of his guest which have been brought to his inn, and the loss of such goods is conclusive of the innkeeper's liability unless he can show that the guest was guilty of negligence which conduced to the loss (a).

(u) *Finucane v. Small*, 1 Esp. 315.

(x) For an instance of this, see *Re United Service Co., Johnston's Claim*, L. R. 6 Ch. 212, where the bankers were bailees for reward.

(y) *Giblin v. M'Mullen*, L. R. 2 P. C. 317. See *Foster v. Essex Bank*, 17 Mass. Rep. 479.

(z) *Jobson v. Palmer*, [1893] 1 Ch. 71. In this case Romer, J., was of opinion that the liability of the trustee was not affected by the fact of his being remunerated for his services.

(a) *Calve's Case*, 8 Rep. 32; 1 Sm. L. C., 12th ed., 131; *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11.

The Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), has amended this by limiting the liability of the innkeeper (except in reference to horses or other live animals and carriages) to £30 except where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ, and where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

A boarding-house or lodging-house keeper does not come under the full liability of an innkeeper, but he is bound to take reasonable care of the goods of his lodger which are in his house, and in this respect there is no difference between his negligence and that of his servant in the course of the employment (b). At the same time, "it cannot be said that the landlord is under an absolute duty to take reasonable care of the luggage, if by the word 'care' it is implied that the landlord is in the same position as if the care and custody of the luggage had been committed solely to him. That cannot be implied, without further knowledge of the facts, merely from the position of a boarding-house keeper towards his paying guest" (c).

The plaintiff went into a restaurant for dinner. On his entering the room a waiter took his coat, without being asked, and hung it on a peg. When the plaintiff rose to leave his coat was gone. The Court held that, on the assumption that the defendant (the restaurant keeper) was a bailee of the coat, there was evidence of a want of reasonable care on his part in the custody of it, such as to render him liable for the loss (d).

A bailee for reward, other than a common carrier or an innkeeper, is usually liable for loss or damage to the goods in his custody if caused by the negligence of his servant in the course of his employment, but is not ordinarily an insurer of the safety of the goods; and unless he has been guilty of some act of negligence leading to their loss or damage he will not be responsible for loss or damage caused by an act of his servant, such as larceny, that is outside the scope of the servant's employment.

Thus where A. intrusted B. (a chronometer-maker) with a chronometer to be repaired, and B. suffered his servant to sleep in the shop in which the chronometer was deposited, and B.'s servant stole it, and it appeared that B., at the time when the theft was committed, had deposited his own watches in a more secure place, B. was held liable to A. for its value (e).

The owners of a carriage and horses who had let them out on hire

(b) *Scarborough v. Cosgrove*, [1905] 2 K. B. 805, following the judgments of Lord Campbell, C.J., and Coleridge, J., in *Dansey v. Richardson*, 3 E. & B. 144.

(c) Per Romer, L.J., in *Scarborough v. Cosgrove*, [1905] 2 K. B. 805, at p. 815, in which he says that this view accounts for many of the observations of Erle, C.J., in *Dansey v. Richardson*, *supra*, and in *Holder v. Soulby*, 8 C. B. (N. S.) 254.

(d) *Ultzen v. Nicols*, [1894] 1 Q. B. 92.

(e) *Clarke v. Earnshaw*, 1 Gow, 80.

to the defendant brought an action to recover damages for the injuries caused to them by the negligent driving of the defendant's servant. The defendant, after driving home in the carriage, told his servant to take it to the stable; but the servant, instead of doing as he was told, drove off in another direction to pick up a friend, and by his negligent driving damaged the carriage. A Divisional Court held the defendant liable (f). This decision, as appears from the judgments in the case next referred to, can only be supported on the assumption that the servant was then acting in the course of his employment.

This case was an action by a coachbuilder against a person to whom he had lent a carriage while he was repairing a carriage belonging to the defendant. The defendant's coachman wrongfully took the plaintiff's carriage out of the defendant's stable and drove off with some friends on a frolic of his own. He brought the carriage back damaged by a collision with a tramcar. There had been no want of care on the part of the defendant, and the Court of Appeal held that he was not answerable for the consequences of an act of his servant which was outside the scope of the servant's employment (g).

Two other cases have arisen out of the theft of samples of goods from a "commercial brougham." In each case the plaintiff had hired from the defendant a commercial brougham, with horse and driver, to enable his traveller to visit customers with samples of goods for sale. In each case the samples were stolen while the brougham and its contents were left by the traveller, during his temporary absence in a hotel, in charge of the driver supplied by the defendant. In the first case (h) the driver, in breach of his duty to look after the brougham during the traveller's absence, had left the carriage unattended in the street, and an unknown thief stole the goods from the interior of the carriage. For the consequences of this negligent act of his servant in the course of his employment the defendant was held liable. In the second case (i) the driver was himself the thief; and since the crime was outside the scope of his employment and was not due to any negligence on the part of the defendant, the defendant was held not to be liable.

An exception from the rules by which masters are responsible for the acts of their servants was formerly to be found in the case of compulsory pilotage. By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 633, an owner or master of a ship was not answerable for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot was compulsory by law.

Now, by the Pilotage Act, 1913 (2 & 3 Geo. V. c. 31), s. 15: "Not-

(f) *Coupe Co. v. Maddick*, [1891] 2 Q. B. 413.

(g) *Sanderson v. Collins*, [1904] 1 K. B. 628.

(h) *Abraham v. Bullock*, 86 L. T. Rep. 796.

(i) *Cheshire v. Bailey*, [1905] 1 K. B. 237.

withstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.”

Where a master has a power of selection, it makes no difference in his liability for the acts of the person selected that he is bound to select from a particular class of persons, however numerous or limited that class may be.

Thus, although by the statute for regulating watermen and lightermen on the Thames (k), and the bye-laws ordained in pursuance thereof, no one besides freemen or apprentices to freemen, or to widows of freemen, of the Watermen and Lightermen’s Company (with certain exceptions), may navigate craft on the river for hire, within the limits of the Act, under a penalty; but any persons may keep and use craft for carrying their own goods, by their servants being such freemen or apprentices; and on board of every barge, &c. there must be at least one able and skilful man authorised by law to navigate; yet the owner of a barge, who hired two qualified persons to navigate it within the limits, was held liable for injury caused to another vessel by their negligence. And it was held to make no difference whether the navigators were hired for the job or by time (l). On that occasion Patteson, J., said: “On the part of the defendant it is argued that this is a case, not of master and servant, but of an independent contract to perform the work, as in *Milligan v. Wedge* (m) and *Quarman v. Burnett* (n). But that is clearly erroneous. Independently of the Act, the men navigating the barges would clearly be the defendant’s servants. If the defendant, being at liberty to employ whom he pleased, engaged persons to manage his barges on the Thames, I cannot see how it is possible to contend that they were not his servants, as much as a man whom he might employ to drive his carriage. Where, indeed, a man hires another man’s servant from him, though such servant be employed to drive where the person hiring pleases, it has been held in *Quarman v. Burnett*, that the servant so hired is not the servant of the person so hiring. That case certainly carried the exception a great way, but there the servant hired was ordinarily in the employment of the person from whom he was hired, and who let horses along with the driver. That case is not like the present. The second question then is as to the effect of stat. 7 & 8 Geo. IV. c. lxxv. That indeed confined the defendant to employing as his servants only individuals of a particular class. It narrowed the number of persons from whom he could select. . . . no case has gone so far as to decide that the person hired ceases

(k) 7 & 8 Geo. IV. c. lxxv. See now 22 & 23 Vict. c. cxxxiii.

(l) *Martin v. Temperley*, 4 Q. B. 298.

(m) 12 A. & E. 737.

(n) 6 M. & W. 499.

to be the servant of the person hiring, if he is necessarily selected from a number, though limited. . . . I do not put the case on the largeness of the number from which the selection may here be made; the principle seems to me the same whether the number be five hundred or five thousand. If there be a power of selection, . . . the person hired is the servant of the person hiring."

There is also a large class of cases which must not be entirely omitted here, but which it will be sufficient to refer to generally, as they do not properly relate to the law of Master and Servant, in which the owners of fixed real property, as land and houses, have been held responsible for the acts of persons not, strictly speaking, their servants. The doctrine, however, on which these cases rest was placed within its proper limits, in a very elaborate judgment pronounced by Lord Cranworth (*o*), in a case in which he stated that, after full consideration, he had come to the conclusion that no distinction in point of law existed, in cases like that under consideration, between fixed property and ordinary moveable chattels, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance.

We have hitherto been considering chiefly the liability of a master to answer for his servant's acts, which formerly would have given rise to an action on the case. A master may also be liable in trespass for an injury caused by the direct act of his servant, and the difference between the circumstances giving rise to an action for trespass and those affording ground for an action on the case has been the subject of many decisions in which the only question was which form of action the plaintiff should have sued in (*p*).

"Where the trespass complained of is the direct and necessary consequence of an order given for its committal, the person who gives the order is clearly liable for the consequences, as much as if the trespass were done by his own hand; and where the relation of master and servant exists, the former is liable for the tortious acts of the latter wherever they are such as come within the scope of the servant's general duty. . . . This rule holds especially where the master is absent and the duty to be performed vicariously is general in character, as in the case of conductors of public vehicles, railway servants and the like" (*q*).

(*o*) *Reedie v. London and North Western Railway Co.*, 4 Ex. 244, which was an action for damages sustained by a person passing under a viaduct in course of construction on the defendants' railway, and they were held not liable. In that case all the previous authorities will be found. See also *Overton v. Freeman*, 11 C. B. 867; *Knight v. Fox*, 5 Ex. 724, *ante*; *Higgs v. Maynard*, 14 L. T. (N. S.), 332; *White v. Jameson*, 18 Eq. 303. The case of *Reedie v. London and North Western Railway Co.* has been followed in America: *Simons v. Monier*, 29 Barb. 420.

(*p*) These are referred to in earlier editions of this book; and see *Holmes v. Mather*, L. R. 10 Ex. 261.

(*q*) *Lucas v. Mason*, L. R. 10 Ex. 251, at p. 253.

The liability, however, to be sued for trespass in respect of injuries caused by another person does not depend upon the relationship of master and servant, though the existence of that relationship may possibly afford an *à fortiori* reason for holding the master responsible. His liability depends upon the fact, that the act of trespass complained of was done by his command, that, in truth, it was his own act, although done through the instrumentality of his servant, according to the maxim *Qui facit per alium, per seipsum facere videtur*. Thus (r), the defendant who, together with a party of friends, had hired a carriage and four horses, driven by two postilions in the service of the owner of the horses, to go to Epsom, rode on the box of the carriage, and in going through a toll-bar, at which there was a crowd, called out to the postilion on the leader "go in there," pointing to a position in front of a gig in which the plaintiff was riding, which belonged to and was driven by M., and the postilion pushed his horses forward, and in doing so, upset the gig and the plaintiff, and M. fell out. Some one in the carriage cried out "go on, go on," but M. got up, stopped the horses and would not allow the carriage to proceed, although the defendant offered to settle then, until the defendant gave his card, saying, that he would be answerable for all that occurred if M. would allow him to proceed. The defendant was held liable in trespass for the injury sustained by the plaintiff; although, according to the decision before adverted to in the case of *Quarman v. Burnett*, the postilions could not be considered as his servants: Erskine, J., saying: "The cases in which it has been decided that case will not lie against the hirer of a carriage and horses for the misconduct of the driver, not being his servant, do not apply here; for this is an action treating the defendant as a co-trespasser, and is not brought against him as a master for the misconduct of his servant."

A local authority was held liable for trespass where a person with whom they had contracted for the cartage and removal of sewage deposited it on the plaintiff's land. Under the contract the local authority must be held to have retained the duty of disposing of the sewage, and they were under a liability to see that this duty was performed without legal injury to anybody (s).

Again, if an act of trespass, on the part of a servant, be the natural or necessary consequence of an act which his master ordered to be done, his master will be liable to an action for trespass. And in this case, also, the presence or absence of the master at the time of the trespass is committed can make no difference in his liability.

Thus, where (t) the defendant, who disputed the plaintiff's right of way through a yard, employed a labourer to lay down rubbish in

(r) *M'Laughlin v. Pryor*, 4 M. & G. 48.

(s) *Robinson v. Beaconsfield Rural District Council*, [1911] 2 Ch. 188.

(t) *Gregory v. Piper*, 9 B. & C. 591. See *Sharrod v. London and North Western Railway Co.*, 4 Ex. 580.

order to obstruct the way, but gave him orders not to let any of the rubbish touch the plaintiff's wall; and the labourer executed those orders as nearly as he could, but some of the rubbish, it being of a loose kind, naturally shingled down towards and ran against the plaintiff's wall: the defendant was held liable in an action of trespass. *Littledale, J.*, said: "Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order, which it is difficult for the servant to comply with, and the servant, in the execution of the order, breaks through the restriction, the master is liable in trespass. Suppose the case of two persons possessed of contiguous unenclosed land, and that the one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbour, and that the cattle went upon the land of the neighbour, the master would be answerable in trespass, because he has only a right to expect from his servant ordinary, not extraordinary, care. If the servant, therefore, in carrying into execution the orders of his master uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant, the master will only be liable in case. Here the servant used ordinary care in the course of executing his master's order and notwithstanding that the rubbish ran against the wall."

An action was brought for an assault committed on the plaintiff at a meeting whereof the defendant was chairman. There was a disturbance near where the plaintiff was standing, and the defendant said, "Bring those men to the front," whereupon a steward, whose duty it was to, assist the chairman in keeping order, with the help of two policemen, assaulted and injured the plaintiff. The plaintiff himself had not made any disturbance. The defendant was held not to be responsible, there being no pre-existing relationship of master and servant between himself and the steward, nor "any evidence of any general or implied authority going beyond the limit of that which was created by the express words used, or of any authority to the persons ordered to bring the disturbers forward to exercise a discretion as to who were disturbers" (u).

Nor is the master liable where the servant does an unlawful act which the master did not authorise (x).

If an act of trespass be committed by a servant on behalf and for the benefit of his master, it is perfectly clear that the master, although he gave no previous command to his servant to commit the trespass, may nevertheless render himself liable to an action of trespass by a subsequent ratification of the servant's act (y).

(u) *Lucas v. Mason*, L. R. 10 Ex. 251.

(x) *Lyons v. Martin*, 8 A. & E. 512, p. 228, ante.

(y) *Eastern Counties Railway Co. v. Broom*, 6 Ex. 314. In that case an officer of the company took Broom into custody for breach of the company's bye-laws, and took him before a magistrate, when the attorney of the company attended to prefer

An exception, however to the general rule, which renders a man responsible in a civil action for the tortious acts of those employed by or under him, is to be found in the case of servants of the Crown (z), such as the postmaster-general, the lords commissioners of the treasury, the commissioners of customs and excise, the auditors of the exchequer, &c., who are not liable, as such, for any negligence or misconduct of the inferior officers in their several departments (a). The principle upon which their non-liability depends was settled in the year 1701, in an action brought against the postmaster-general, for the loss of a letter containing exchequer bills, by the negligence of his servants and deputies: and three judges, against Lord Holt, held, that the plaintiff was not entitled to recover (b). The same question was again still more elaborately discussed in 1778 in an action brought against the postmaster-general, to recover the amount of a bank-note stolen out of a letter by one of the sorters of letters, when the Court adhered to the doctrine of the three judges, in *Lane v. Cotton*, against the opinion of Lord Holt. In that case (c) Lord Mansfield said: "The ground of Lord Chief Justice Holt's opinion in that case is founded upon comparing the situation of the postmaster to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a postmaster and a carrier or the master of a ship seems to me to hold in no particular whatever. The postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the post-office is a branch of revenue and a branch of police, created by Act of Parliament. As a branch of revenue there are great receipts; but there is likewise a great surplus of benefit and

a charge against Broom. This was held not to amount to a ratification of the act of their servant by the company. Mere knowledge is no evidence of ratification: *Moon v. Towers*, 8 C. B. (N. S.) 611. In *Marsh v. Joseph*, [1897] 1 Ch. 213, Lord Russell, C.J., said: "To constitute a binding adoption of acts *à priori* unauthorised, these conditions must exist: (1) The acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be shown that the principal intended to take upon himself the responsibility for such acts, whatever they were." In *Firth v. Staines*, [1897] 2 Q. B. 70, Wright, J., lays down three conditions which must be satisfied to constitute a valid ratification: "First, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done, the agent must have had a competent principal; and, thirdly, at the time of the ratification the principal must be legally capable of doing the act himself."

(z) The Trinity House is not a servant of the Crown so as to be exempt from liability to an action for negligence in the performance of its duties: *Gilbert v. Trinity House*, 17 Q. B. D. 795.

(a) *Whitfield v. Lord Le Despencer*, 2 Cowp. 754, at p. 766; see Story on Agency, 319. The subordinates themselves, however, may be responsible: see e.g., *Feather v. Reg.*, 35 L. J. Q. B. 200.

(b) *Lane v. Cotton*, 1 Lord Raym. 646; see *Winterbottom v. Wright*, 10 M. & W. 109, and the general principles of law laid down by Romer, J., in *Raleigh v. Goschen*, [1898] 1 Ch. 73.

(c) *Whitfield v. Lord Le Despencer*, 2 Cowp. 754, at p. 764; *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178.

advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and intrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy, therefore, between the case of the postmaster and a common carrier" (d).

Upon similar principles, the captain of a man-of-war has been held not responsible for damage done to another vessel by his ship, during the watch of the first lieutenant, who was on deck and had the direction of the ship, the captain not being on deck, or called upon by his duty to be so, as he did not appoint the officers or crew, and had no choice whether he would serve with them or not, and had no power of dismissal over them. They were, in fact, all servants of the same master (e). These three last-mentioned cases were, in fact, decided upon the ground that the Government was the principal and the defendant merely the servant (f).

But this exception would not apply so as to exempt a person, who was a public officer, from responsibility for the act of one who was his own servant. And, therefore, in *Lord North's Case* (g), where it appeared that King Edward VI. sold a quantity of lead, and appointed Lord North, who was Chancellor of his Court of Augmentations, to take bond for payment of the money, and Lord North ordered his clerk to take the bond, which was done, and the bond delivered to Lord North, who gave it back again to his clerk in order to send it to the clerk of the Court of Augmentations, but Lord North's clerk suppressed the bond: it was the opinion of all the judges in England, that Lord North was chargeable to the king.

Another exception to the general rule above stated was formerly (h) supposed to exist in favour of public bodies constituted by statute for local purposes, and acting gratuitously, such as commissioners of sewers, paving commissioners, navigation commissioners, &c., and trustees of turnpike roads, who were held not responsible for damage done by persons acting under their orders, in carrying into effect the purposes for which they were appointed (i).

(d) See Story on Bailm., s. 462; Story on Agency, s. 319, note 2.

(e) *Nicholson v. Mouncey*, 15 East, 384.

(f) Per Blackburn, J., in *Mersey Docks and Harbour Board v. Gibbs*, L. R. 1 H. L. 93. See *Buron v. Denman*, 2 Ex. 167.

(g) *Dyer*, 161; see *Boson v. Sandford*, 3 Mod. 321.

(h) *Hall v. Smith*, 2 Bing. 156, was one of the principal cases in which this was held.

(i) Where any action, prosecution or other proceeding is commenced "against any person for any act done in pursuance, or execution or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority," it must be commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof: see sect. 1, and other provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which also abolishes the necessity for notice of action formerly required by many Acts of Parliament in actions of this kind.

But the cases which had been decided in accordance with this supposed exception were fully considered in the House of Lords, and were overruled. Blackburn, J., delivered the opinion of the judges in answer to the questions put to them by the House, and the House of Lords approved of what he then said. He said (*k*): "We think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds (*l*), be co-extensive with that imposed by the general law on the owners of similar works."

So in an action for injuries sustained by a pupil through the negligence of a teacher in a provided school, under the control of the defendant corporation as education authority, with all the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870-1900, it was held that the relation of the education authority to the teacher was that of master and servant, so that all the consequences as regards liability for the acts of the servant attached to the authority (*m*).

(*k*) *Mersey Docks, etc. Board v. Gibbs*, L. R. 1 H. L. 93, 107. See also *Coe v. Wise*, L. R. 1 Q. B. 711; and *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214.

(*l*) In *R. v. Selby Dam Drainage Commissioners*, [1892] 1 Q. B. 348, the prosecutor had recovered judgment in an action for negligence against the defendants, but the defendants had no goods available in execution. The Court of Appeal held that he was entitled to a mandamus to compel the defendants to make a rate under their local Act for the purpose of raising money to pay the judgment debt.

(*m*) *Smith v. Martin and the Corporation of Kingston-upon-Hull*, [1911] 2 K. B. 775. Compare *Crisp v. Thomas*, 63 L. T. 756, where the power of the trustees and managers of a parish school to appoint and dismiss a teacher was held not to make her their servant, so as to render them liable for her negligence while engaged in teaching, as they had no control over her so as to be able to direct her what to do or what not to do in the daily management of the school.

CHAPTER VI.

THE LIABILITY OF A SERVANT TO THIRD PERSONS FOR ACTS DONE ON
BEHALF OF HIS MASTER.*In Cases of Contract.*

GENERALLY speaking, a servant who, having authority to do so, enters into a contract in his master's name, is not himself personally liable upon such contract (a), though he may, undoubtedly, like any other agent, contract in such manner as to make himself personally liable (b).

Thus, if he do not possess authority from his master to contract in his name, or, which is in effect the same thing, if he exceed the authority given him, or if he fraudulently misrepresent his authority, there can be no doubt that he will be personally liable to the person with whom he deals in his master's name (c). Questions of this sort frequently resolve themselves into mere questions of credit. To whom was the credit given? The answer to which must depend upon the circumstances of the case. If the credit was given to the master, the servant could not be made liable, provided he had authority to contract. But if the credit was given to the servant, even for goods supplied for his master's use, he could not discharge himself from liability on the ground that he was a mere agent (d). A servant would also be liable if, at the time he entered into a contract, he did not disclose his master's name, and it was not known to the party contracting with him, although he was known to be a mere agent (e).

The following rather curious case shows the difficulty servants may get into by using their own names when in reality acting for their masters (f).

(a) Paley on Ag., 368; Story on Ag., 261; *Owen v. Gooch*, 2 Esp. 567.

(b) *Macbeath v. Haldimand*, 1 T. R. 172, per Ashurst, J.; *Thomson v. Davenport*, 9 B. & C. 88, per Bayley, J.; *Burrell v. Jones*, 3 B. & Ald. 50, per Bayley, J.

(c) *Yonge v. Tynbee*, [1910] 1 K. B. 215. The principle laid down in *Smout v. Ilbery*, 10 M. & W. 1, that there must be some wrong or omission of right on the part of the agent to make him liable is not now a correct statement of law (*ibid.* per Buckley, L.J., at p. 226). See also *Collen v. Wright*, 8 E. & B. 647.

(d) *Saxon v. Blake*, 29 Beav. 438.

(e) So in the case of auctioneers, *Hanson v. Roberdeau*, Peake, 163; *Franklyn v. Lamond*, 4 C. B. 637. See *Fisher v. Marsh*, 34 L. J. Q. B. 177.

(f) *Williamson v. Barton*, 31 L. J. Ex. 171. In *Ex parte Bird*, 33 L. J. Bankr. 49, an agent taking shares in his own name was held liable as a contributory.

The plaintiff, a farmer, put up the produce of his farm to auction. The defendant had been for some time previous to, and at the time of the sale was, foreman to S., a contractor, which was well known to the plaintiff, who was present at the sale, but was not known to the auctioneer. The defendant at the auction bid for several lots of hay, and when the auctioneer asked for his name, in the usual way, he answered "Barton" only, and the auctioneer wrote it down as the name of the buyer. A few days after the sale the auctioneer sent in an account to the defendant. The hay was without any direction or interference of the defendant, taken away in S.'s carts, and consumed by his horses before his death, which occurred ten days after the auction. An action was brought against the defendant for the price of the hay, to which the defence set up was that defendant bought the hay for his master S. At the trial the jury found for the defendant. But upon a rule for a new trial the judges were equally divided in opinion as to his liability, and leave to appeal was granted, but the appeal does not appear to have been argued.

But where a servant has once had authority to contract in his master's name, and the authority is revoked without his knowledge, he would not be liable upon contracts entered into in his master's name, in ignorance of the revocation of his authority. If, for instance, a man leaves a housekeeper in possession of his house, and goes abroad and dies, the housekeeper would not be liable to pay for goods obtained on her master's credit after his death, and before she knew of his death, provided they were of a description which she was authorised by her master to pledge his credit for during his life (*g*), although in such case her master's representatives would not be liable, as her authority to pledge his credit was in fact revoked by his death (*h*).

When clerks or other servants enter into written contracts on behalf of their employers, they should be careful to do so in such a manner as to exclude the possibility of their being personally liable themselves upon such contract, in the event of their employer failing to perform the engagements thus entered into. For if such a contract purport on the face of it to bind the clerk, or party signing it, himself personally, it is not competent for him to discharge himself from liability by evidence that he was acting merely in a ministerial capacity as agent for his employer (*i*). To exempt himself from personal responsibility, a clerk should either sign his employer's name, or, if he signs his own,

(*g*) *Smout v. Ilbery*, 10 M. & W. 1. The principle of this case applies also to a revocation of authority by the dissolution of a company as well as by the death of an individual: *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43; and see *Re Oriental Bank*, 28 Ch. D. 634.

(*h*) *Blades v. Free*, 9 B. & C. 167.

(*i*) *Higgins v. Senior*, 8 M. & W. 834. If the written contract describe the person who is really only an agent as principal, the real principal can neither sue nor be sued upon the contract: *Humble v. Hunter*, 12 Q. B. 310.

should expressly state his ministerial character, as by using the words "per procuration," or other words of a similar import (*k*).

The agent to a country bank, to whom the plaintiff sent a sum of money in order to procure a bill upon London, and who, thereupon, drew a bill in his own name for the amount upon the firm in London, the two firms being the same, was held personally liable as drawer of the bill, although the plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank to which the agent paid over the money (*l*), and Lord Ellenborough said: "Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable. Now, in the present case, although the plaintiff knew the defendant to be agent to the Durham bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not done so, and therefore has made himself liable."

The rule illustrated by these cases is an inflexible one, and is by no means confined to bills of exchange, but applies to other written contracts (*m*), and is founded upon the principle before adverted to, that parol evidence is not admissible to contradict or vary any contract which has been reduced to writing (*n*).

Where written contracts are entered into by clerks or other agents a difficulty frequently arises, from the mode in which they are worded, as to the meaning of the parties; whether they intended to contract for themselves personally or not. In such cases the general rule applies, that the construction of written documents is for the Court. And it may be said, that, generally speaking, the onus of proving that a person who has signed a written document merely acted as agent for some one else in so doing, lies upon the agent who would exempt, himself from responsibility.

When the defendant covenanted "for himself, his heirs, executors, &c., on the part and on behalf of" A. B., that A. B. would pay a sum of money, the defendant was held personally liable (*o*).

(*k*) *Bills of Exchange Act*, 1882 (45 & 46 Vict. c. 61), s. 26.

(*l*) *Leadbitter v. Farrow*, 5 M. & S. 345.

(*m*) *Jones v. Littledale*, 6 A. & E. 486; *Magee v. Atkinson*, 2 M. & W. 440. See per Lord Wensleydale, in *Higgins v. Senior*, 8 M. & W. 845; *Kelner v. Baxter*, L. R. 2 C. P. 174.

(*n*) *Ante*, Chapter II.

(*o*) *Appleton v. Binks*, 5 East, 148. See *Downman v. Williams*, 7 Q. B. 103; *Norton v. Herron*, 1 C. & P. 648.

So where the solicitors of the assignees of a bankrupt, upon whose lands a distress had been put by the landlord, gave a written undertaking, thus: "We, as solicitors to the assignees, undertake to pay," &c.; they were held personally liable (*p*).

Again, where "C., on the part of N.," agreed to let certain premises to P. for a term of years, and C. signed the agreement but N. did not, C. was held personally liable to an action for not completing the lease (*q*).

So where "R. and F., of London, merchants," signed a charter-party "by authority of and as agents for Mr. A. H. S., of Memel," R. and F. were held personally liable for a breach of it (*r*).

But where the defendants, who were fruit brokers, signed in their own names a sold note in which it was stated that "We have this day sold to you on account of James Morand & Co., Valencia, 2,000 cases Valencia oranges," the Court of Appeal held (*s*) that the words "on account of" showed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable on the contract.

And where the defendants signed a contract on behalf of a proposed company, they were held personally liable (*t*).

But where A., an auctioneer, entered into and signed an agreement as agent of B., and B. shortly afterwards signed it with the words, "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf," it was held that A. was not personally responsible (*u*).

And so where A. (an agent) made a promise in the following terms: "I undertake (on behalf of Messrs. E. & Co.) to pay," &c., it was held to be (upon the face of it) an undertaking as agent, and not to be binding upon A. personally, as there appeared to be no want of authority on his part to make such an undertaking, and no excess of authority in making it (*x*).

So, again, where solicitors to certain assignees, "on behalf of the assignees," consented to do certain things, the solicitors were held not to be personally liable (*y*).

And where a banker signed a promissory note, "I promise to pay,"

(*p*) *Burrell v. Jones*, 3 B. & Ald. 47; and see *Iveson v. Conington*, 1 B. & C. 160; *Hall v. Ashurst*, 1 C. & M. 714; *Watson v. Murrell*, 1 C. & P. 307.

(*q*) *Tanner v. Christian*, 4 E. & B. 591; *Reid v. Dreaper*, 6 H. & N. 813.

(*r*) *Lennard v. Robinson*, 5 E. & B. 125; see also *Cooke v. Wilson*, 1 C. B. (N. S.) 153; *Parker v. Winlow*, 7 E. & B. 942.

(*s*) *Gadd v. Houghton*, 1 Ex. D. 357, disapproving *Paice v. Walker*, L. R. 5 Ex. 173, in which the defendants, who contracted "as agents," were held personally liable.

(*t*) *Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, L. R. 2 C. P. 255.

(*u*) *Spittle v. Lavender*, 2 Brod. & B. 452; *Bowen v. Morris*, 2 Taunt. 374.

(*x*) *Downman v. Williams*, 7 Q. B. 103; see the American cases cited in Story on Ag. 154.

(*y*) *Lewis v. Nicholson*, 18 Q. B. 503.

&c., "for C. M. P. and S., R. M.," it was held that this did not give a separate right of action against the party signing (z).

Again, where a contract was made in London, as follows: "Contract between Messrs. V. & T., Morlaix, France, and M. (plaintiff), London. M. engages himself hereby with Messrs. V. & T., Morlaix, from, &c., till, &c., for the proper and merchantable cutting, messing and preparing of French provisions, at Morlaix (as pork, beef and bacon), on receiving a free passage out to Morlaix from London and back again, and wages of 30s. sterling per week, Messrs. V. & T. finding the requisite tools. Should any differences arise on account of M.'s inability or improper conduct, this contract is to be considered null and void, and M. has no claim for further wages nor free passage back to London." And signed, "For V. & T., Charles Kekule" (defendant). The defendant was held not to be personally liable (a).

Again, where three directors signed a promissory note in this form: "Three months after date we jointly promise to pay F. S. or order £600, for value received in stock on account of the L. & B. Iron and Hardware Co., Limited;" they were held not to be personally liable (b).

And where the secretary to a railway company signed a note in this form: "On demand I promise to pay R. £1,500 with legal interest until paid; value received. For the M.T. and W. Railway Company, J. Sizer, Secretary;" he was held not to be personally liable; Kelly, C.B., referring to the well-known form of a Bank of England note, for which no one ever thought of making the officer who signs personally liable (c).

Where the plaintiff and several others, being performers in the orchestra at the opera, Covent Garden, had a claim against the defendant for thirteen nights' salary, and negotiations took place in the green-room of the theatre, the plaintiff acting on behalf of himself and the other performers, and the plaintiff signed the following document: "The gentlemen of the orchestra, &c., are willing and hereby pledge themselves to continue their services and attend their duties provided B. will guarantee the payment of the thirteen nights due on the 5th ult. Signed on behalf of the gentlemen of the orchestra. C. Lucas;" it was held to be a joint contract, and that the plaintiff could not sue alone for a breach of it (d).

A person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts

(z) *Ex parte Buckley*, 14 M. & W. 469.

(a) *Mahony v. Kekule*, 14 C. B. 390.

(b) *Lindus v. Melrose*, 3 H. & N. 177; see *Aggs v. Nicholson*, 1 H. & N. 165.

(c) *Alexander v. Sizer*, L. R. 4 Ex. 102. Where judgment has been obtained against the master, the servant cannot be sued: *Priestley v. Fernie*, 34 L. J. Ex. 172.

(d) *Lucas v. Beale*, 10 C. B. 739; *Jung v. Phosphate of Lime Co.*, L. R. 3 C. P. 139.

for any damages he may sustain by reason of the assertion of authority being untrue; and a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist (e).

An agent who has put himself in this position is not liable on the contract itself (f), but can be sued for damages for breach of warranty of authority.

This doctrine is not applicable to the case of a contract made by a public servant acting on behalf of the Crown (g).

A question, however, more frequently arises as to the personal responsibility of a clerk, or other servant, or agent, to persons other than his master, or principal, for money which has been paid to him on account of his master. And the question is one of much importance, and some difficulty. The general rule applicable to cases of this sort, undoubtedly, is that payment to a clerk, or servant, authorised to receive the money, is payment to the master, who receives by the hand of his clerk. Generally speaking, therefore, when money is rightfully obtained by, or paid to, a clerk, or other servant, authorised to receive it on account of his master, any action to recover it back should be brought against the master (h). And this rule is but just,

(e) *Collen v. Wright*, 8 E. & B. 647; see also *Polhill v. Walter*, 3 B. & Ad. 114; *Jenkins v. Hutchinson*, 13 Q. B. 744; *Randell v. Trimen*, 18 C. B. 786; *Richardson v. Dunn*, 30 L. J. C. P. 44; *Beattie v. Lord Ebury*, L. R. 7 H. L. 102; *Weeks v. Probert*, L. R. 8 C. P. 427; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360; *Starkey v. Bank of England*, [1903] A. C. 114. As to measure of damages, see *Meek v. Wendt*, 21 Q. B. D. 126. The principle of *Collen v. Wright* extends further than the case of one person inducing another to enter into a contract. "The rule to be deduced is that where a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it was made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred": *Firbank's Executors v. Humphreys*, 18 Q. B. D. 54, per Lord Esher, M.R., at p. 60.

(f) *Lewis v. Nicholson*, 18 Q. B. 503. In some American Courts the agent is held directly answerable on the contract as a party, and the name of the person for whom he assumed to act is rejected as surplusage. This appears to be a matter of form rather than substance. See *Collins, L.J.*, in *Thompson v. London County Council*, [1899] 1 Q. B. 840, referring to *Kelner v. Baxter*, L. R. 2 C. P. 174, in which an agent was held personally liable on a contract entered into by him professedly as agent, because his alleged principle was in fact non-existent. As to the effect of knowledge of the person contracting with the alleged agent that the agent's alleged authority was non-existent, see *Halbot v. Lens*, [1901] 1 Ch. 344. In *Bennetts v. M'Iwraith*, [1896] 2 Q. B. 464, the plaintiffs, being in doubt as to whether the defendants had or had not authority, were allowed to add the alleged principals as defendants.

(g) *Dunn v. Macdonald*, [1897] 1 Q. B. 555. In *Graham v. Commissioners of Public Works*, [1901] 2 K. B. 781, it was held that an action for breach of contract would lie against the defendants, an incorporated body, though servants of the Crown.

(h) *Ellis v. Goulton*, [1893] 1 Q. B. 350; Selw. N. P. 102, 11th ed.; Paley on Ag. 388; see *Hemming v. Hale*, 29 L. J. C. P. 137; *Collins v. Brook*, 29 L. J. Ex. 255; *Bridges v. Garrett*, L. R. 5 C. P. 451; *Papé v. Westacott*, [1894] 1 Q. B. 272; *Ex parte Byrne*, 35 L. J. Bankr. 43 (possession by a clerk of his master's books is possession by the master). In *R. v. Lambton*, 5 Price, 428, where a man made up a

for since, in general, an agent cannot dispute the title of his principal—and it is only in very special cases (i) that he can set up *jus tertii* against his principal—a servant who had received money on account of his master could not dispute his master's right to it, and to hold the servant responsible to third persons would be to subject him to two actions for the same cause.

Upon this principle depends the case of *Sadler v. Evans* (k). In that case it appeared that the defendant, as receiver to Lady W., received quit-rent due to her from the plaintiff; and gave a receipt for it as such. The plaintiff, contending that Lady W. was not entitled to the quit-rent, brought an action for money had and received against the receiver, but was nonsuited on the ground that the payment to the receiver was payment to Lady W., and the action ought to have been brought against her. And the Court, in discharging a rule which had been obtained to set aside the nonsuit, observed that in cases of payment to a known agent the action ought to be brought against the principal, unless in special cases (as under notice, or *malá fide*).

The principle upon which *Sadler v. Evans* was decided may be not inaptly illustrated by a case the exact converse of it. The defendant's agent, R., had contracted to sell an estate belonging to the defendant to the plaintiff, and had received a deposit from him; but the conditions of sale not being complied with, the plaintiff brought an action against the defendant to recover his deposit. On the part of the defendant it was objected that no proof was given that the deposit had been paid over to him, and, in fact, it had not been paid to him. But Lord Ellenborough said it made no difference whether it was actually paid over or not; R. acted completely as the agent of the defendant; therefore, when the deposit was lodged with the agent, this was in law, *eo instanti* a payment to the principal (l).

And the following cases, where the action was against the clerk, servant, or agent, were decided upon similar principles:—The defendant, a banker's clerk, signed a receipt for money paid into the bank by the plaintiff, thus: "For Spooner and Attwood, Wm. Read." He was held not liable to an action for money had and received at the suit of the plaintiff; but the action should have been brought against

parcel of bills and notes and gave them to his servant to give to the postman, it was held to be clear that until the servant had done so they were in the possession of the master, and liable to be seized under an extent against him, and that although the bills were specially indorsed.

(i) Such, for instance, as where the master has been guilty of fraud, see *Hardman v. Willcock*, 9 Bing. 382, note; *Cheesman v. Exall*, 6 Ex. 341; *Sheridan v. New Quay Co.*, 28 L. J. C. P. 58; or what is equivalent to eviction by title paramount, *Biddle v. Bond*, 34 L. J. Q. B. 137; approved in *Rogers v. Lambert*, [1891] 1 Q. B. 318.

(k) 4 Burr. 1985; see *Greenway v. Hurd*, 4 T. R. 553; *Stevenson v. Mortimer*, Cowp. 806; acc. in America, *Colvin v. Holbrook*, 2 Comst. Rep. 126.

(l) *Duke of Norfolk v. Worthy*, 1 Camp. 337; *Edgell v. Day*, L. R. 1 C. P. 80; *Ellis v. Goulton*, [1893] 1 Q. B. 350.

Spooner and Attwood; the receipt being evidence that they, and not the defendant, had received the money (m).

And so an attorney's clerk, who, in his master's absence, received some money which was paid to him at his master's office, by a debtor to a client of his master, and signed a receipt thus: "For Mr. S. John, John Badcock," was not responsible to the client for the money, although he had not paid it over to his master, as he was accountable to his master for it, and the client must look to him for redress. And Lord Tenterden said: "It is perfectly clear that the defendant received the money as the agent or servant of John, and must have paid it over to him if he had returned. The receipt given was the receipt of John, and (if he had not been bankrupt) would have been evidence against him in an action brought by the present plaintiff" (n).

Upon similar principles it has been held (o) that attorneys, who, upon an agreement for the sale of an estate belonging to one Stott, had, as his agents, received from the plaintiff a deposit, were not liable to an action at the suit of the plaintiff for a return of the deposit, on the sale going off for want of title in Stott, as they received the money as *his* agents, and to account to him. And Coleridge, J., said that payment over of the deposit was immaterial. The moment the money was in the defendant's hands it was in Stott's hands.

The rule exempting a clerk or other servant from responsibility to third persons for money rightfully received on account of his master, applies *à fortiori* where the money has been paid over by such clerk to his master (p). In that case, even though the money was originally paid by mistake, the clerk paying it over to his master does no wrong. It was paid to him for the purpose of being paid over, and he has effected that purpose, and cannot again be called upon to account for the money, even though his master has no right to retain it. In an old case (q), therefore, where the defendant, who was a clerk of the South Sea Company, received from the plaintiff £600 on account of the third subscription, and by mistake never entered it in the book, but paid it over to the company, Pratt, C.J., ruled that no action would lie against him at the suit of the plaintiff.

Upon this principle it was held (r), that an action for money had and received would not lie against a churchwarden to recover back

(m) *Edden v. Read*, 3 Camp. 338.

(n) *Stephens v. Badcock*, 3 B. & Ad. 354.

(o) *Bamford v. Shuttleworth*, 11 A. & E. 926; and see *Hurley v. Baker*, 16 M. & W. 26.

(p) *Owen v. Cronk*, [1895] 1 Q. B. 265. It was upon this ground that a *mandamus* was refused in *R. v. Shaw*, 5 T. R. 549, see per Patteson, J., in *R. v. Jeyes*, 3 A. & E. 424.

(q) *Cary v. Webster*, Str. 480. And see *Buller v. Harrison*, Cowp. 565, *post*, p. 264.

(r) *Horsfall v. Handley*, 8 Taunt. 136. See also *Greenway v. Hurd*, 4 T. R. 553; *Coles v. Wright*, 4 Taunt. 198; *Tope v. Hockin*, 7 B. & C. 101; *Atlee v. Backhouse*, 3 M. & W. 633; *White v. Bartlett*, 9 Bing. 378; *Ireland v. Thomson*, 4 C. B. 149.

dues which had been paid to him, but which he had paid over to the treasurer of the trustees of the chapel.

The mere passing money in account by an agent without any fresh credit given to, or bills accepted on account of, his principal, is not, however, equivalent to payment over (s), that is, if the account may be considered as still open. But if the agent, having a claim against his principals, transmit to them an account in which, giving credit for the amount received, he debits them with the amount of his claim and strikes a balance in their favour, and afterwards in a subsequent account gives them credit for this balance, which accounts are all adopted and agreed to by the principals; the account then becomes settled, and the transaction is equivalent to payment over of the money (t).

And the doctrine that the receipt of a servant or agent is the receipt of his master or principal, does not apply to the case of a servant who is a wrongdoer, so as to discharge him. If, therefore, a servant acting illegally or wrongfully, gets money into his hands, he cannot defend himself from an action at the suit of the party legally or rightfully entitled to it, on the ground that he acted merely as the agent of his master, and has paid over the money to him. No one but the person legally entitled to the money can give a discharge for it, and until it is paid to him, the servant or agent is liable to be sued by him for it; provided he is not prevented from suing by the rule "*in pari delicto potior est conditio defendentis*" (u).

This was decided in *Miller v. Aris* (x), which was an action brought by the plaintiff, who had been a prisoner in the Coldbath-fields Prison, against the governor of the prison, to recover a sum of money paid by the plaintiff for lodging, while he was confined as a prisoner in that prison, and which sum exceeded the amount allowed by the prison regulations. On behalf of the defendant it was contended that he was not liable, as he had accounted at the sessions to the county for all the sums received on account of the gaol, but he was nevertheless held liable, Lord Kenyon saying that *Sadler v. Evans* (y), and such cases, did not apply, where there is corruption in the foundation of the contract, or it is bottomed in oppression or immorality.

(s) *Buller v. Harrison*, Cowp. 565; *M'Carthy v. Colvin*, 9 A. & E. 607.

(t) *Holland v. Russell*, 4 B. & S. 14; *Newall v. Tomlinson*, L. R. 6 C. P. 405; *Continental Caoutchouc and Gutta-percha Co. v. Kleinwoort, Sons & Co.*, 90 L. T. 474.

(u) As the plaintiff was in *Goodall v. Lowndes*, 6 Q. B. 464; and see *Smith v. Bromley*, 2 Doug. 695; *Williams v. Hedley*, 8 East, 378; *Atkinson v. Denby*, 30 L. J. Ex. 362.

(x) 3 Esp. 231; Selw. N. P. 103. Where the plaintiff's clerk received money from his customers, and paid it to the defendants, upon the chances of the coming up of tickets in the State Lottery of 1772, contrary to the Lottery Act of that year, it was held by Lord Mansfield that the plaintiff might recover the money from the defendants: *Clark v. Shee*, Cowp. 197; and see *Corking v. Jarrard*, 1 Camp. 37, as quoted by Park, J., in *Abbotts v. Barry*, 2 Brod. & B. 371. Where the receipt of money by both master and servant is illegal, the latter is not liable to an action for money had and received at the suit of the former: *M'Gregor v. Lowe*, Ry. & M. 57; *Nicholson v. Gooch*, 25 L. J. Q. B. 137.

(y) 4 Burr. 1985, ante, p. 260.

And so a sheriff's officer was held liable to refund to the plaintiff a sum of money which he had illegally extorted from him, under colour of a warrant from the sheriff; and it was held to be no defence that the defendant had paid the money over to the sheriff, as the defendant acted illegally in receiving the money, which could not, therefore, have been paid to him for the purpose of being paid over to the sheriff (z).

So, where a parish clerk extorted illegal fees, *colore officii*, it was held that the plaintiff might recover them back from him, and need not sue the rector, for whom they were said to have been received (a).

Neither does the doctrine above-mentioned apply to cases in which a servant or agent gets money into his hands by means of a trespass or other tort, committed by the orders of or in company with his master or principal. For all persons concerned in a tort are principals, and as the party injured might bring his action against the servant for damages sustained in consequence of his wrongful act, he is allowed to waive his right to proceed in that form of action, and sue for the money received by the wrongdoer. Upon this ground, where (b) the defendant by direction of his father, who claimed to be executor of the plaintiff's wife deceased, went to her lodgings and took a large sum of money from a bureau, which he said belonged to his father as executor, and which he paid over to him accordingly: the defendant was held liable to an action for the money at the suit of the plaintiff, although it was contended that he merely acted as agent to his father, against whom the action should have been brought. And Tindal, C.J., said: "The defendant was a wrongdoer in taking the money, and would have been liable to the plaintiff in trespass. The plaintiff, however, waives the tort and sues the defendant for money had and received; and the defendant cannot relieve himself from liability by paying over the money to another party, as he might have done if the original taking had been lawful. The circumstance distinguishes the present case from *Stephens v. Badcock* (c); for there the defendant received the money as agent for a party who was entitled to receive it, whereas here the receipt was altogether wrongful, and it must be taken with all its consequences."

(z) *Snowdon v. Davis*, 1 Taunt. 359; see *Smith v. Sleep*, 12 M. & W. 585; *Valpy v. Manley*, 1 C. B. 594; *Wakefield v. Newbon*, 6 Q. B. 276; *Davies v. Vernon*, 6 Q. B. 443; *Oates v. Hudson*, 6 Ex. 346; see also *Parker v. Bristol and Exeter Railway Co.*, 6 Ex. 702; *Townson v. Wilson*, 1 Camp. 396; *Chappell v. Poles*, 2 M. & W. 867.

(a) *Steele v. Williams*, 8 Ex. 625.

(b) *Tugman v. Hopkins*, 4 M. & G. 389; *Edwards v. Hodding*, 5 Taunt. 815; *Neate v. Harding*, 6 Ex. 349; *Sharland v. Mildon*, 5 Hare, 469, where it was held by Wigram, V.-C., that the agent of an executor *de son tort*, collecting the assets, knowing them to belong to the testator's estate, and that his principal was not the legal personal representative, made himself personally liable as executor *de son tort*, notwithstanding he had duly accounted for his receipts to his principal. This case was explained in *Sykes v. Sykes*, L. R. 5 C. P. 113.

(c) 3 B. & Ad. 354; see this case, *ante*, p. 261.

A clerk or other servant or agent who has received money on account of his master and has not paid it over to him before receiving notice not to do so, from or on behalf of the person who paid it, may be liable to refund the money, and cannot shelter himself from such liability under the maxim "*Respondeat superior*," if the circumstances of the case are such that, had the money been paid over to the master, he would have had no defence to an action to recover it: as in such case the servant, if obliged to pay the money over to the person entitled to it, would have a good defence to any action brought against him by his master, and would not be estopped from disputing his title to the money.

Thus, in *Cary v. Webster* (d), it was said by Pratt, C.J., that if the defendant had not paid the money over, "the plaintiff would have had his option either to charge him or the company; as in the common case of payment to a goldsmith's servant, who does not carry it to the account of his master, the party has an election to go against either: he may charge the servant, because, till the money is paid over, the servant receives it to his own use; or he may pass by the servant and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master."

So, in an action (e) brought by the plaintiff, an underwriter, to recover back from the defendant, who was agent for the insured, Messrs. L. & S., resident at New York, a sum paid by the plaintiff upon a loss, supposed to be fair, but which turned out to be foul; the defendant had passed the whole sum in his account with Messrs. L. & S., and given credit to them for it against a sum in which they stood indebted to him, but had accepted no fresh bills nor given any fresh credit to his principals, and had not paid the money over to them: it was held that the mere placing the money to the credit of the principals was not equivalent to paying it over; and that the defendant was liable to refund the money to the plaintiffs. In delivering judgment, Lord Mansfield said: "In general, the principle of law is clear, that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it, because it is just that one man should not be a loser by the mistake of another, and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand, it is just that as the agent ought not to lose he should not be a gainer by the mistake. And, therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake, the agent cannot afterwards pay it over to his principal without making himself

(d) Str. 480.

(e) *Buller v. Harrison*, Cowp. 565. See *Owen v. Cronk*, [1895] 1 Q. B. 265.

liable to the real owner for the amount. But the present case turns upon this, that the agent was precisely in the same situation at the time the mistake was discovered, as before."

And where (f) it appeared that the defendant had received a bar of silver from his correspondent at Gibraltar, and sold it to the plaintiff at a price calculated with reference to the number of ounces, which, on assay, it was supposed to contain, and it turned out afterwards that it contained fewer ounces than had been supposed; the plaintiff was held entitled to recover from the defendant the money overpaid to him, as he had not paid it over to his principal, although he had forwarded an account to him, in which he had credited him with the full sum, but which was still unsettled. And Lord Ellenborough, C.J., said: "I take it to be clear that an agent who receives money for his principal is liable as a principal, so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. Here it is admitted that no money has been paid over by the defendant to his principal, nor has there been any other thing done by him to create a change of circumstances. The only question then is, whether the action lies against the defendant, considering it as if it were an action against the principal."

A servant may also, in some cases, be liable to an action at the suit of a third person for non-payment of money which he has received from his master with orders to pay it to such third person. But in order to render him liable to such an action it is not sufficient that he should have received the money from his master with orders to pay it to a particular person, he must have done some act amounting to a specific appropriation of the money to the use of that person; he must have assented to hold it to his use, otherwise there is no privity between them, and the servant is only responsible to his master (g), and such assent must of course be before action brought.

This position is well illustrated by the case of *Howell v. Batt* (h). That was an action for money had and received. The plaintiff was a joint proprietor of a coach running from Exeter to London, and the defendant was office-keeper and servant to C., the proprietor at Exeter. The defendant used, in his capacity of office-keeper, at stated intervals, to make up the share-bills of the coach, and take sums of money from a

(f) *Cox v. Prentice*, 3 M. & S. 344. It may be observed of both *Buller v. Harrison* and *Cox v. Prentice*, that the principal was a foreigner. See further *Murray v. Mann*, 2 Ex. 538.

(g) Paley on Ag. 394; see *Williams v. Everett*, 14 East, 582; *Lilly v. Hays*, 5 A. & E. 548. And see *Gidley v. Lord Palmerston*, 3 Brod. & B. 275, where the secretary at war was held not liable to an action at the suit of a retired clerk at the War Office for his retired allowance, although the secretary at war had received the money applicable to such allowance. See also *Moore v. Bushell*, 27 L. J. Ex. 3; *Hill v. Royds*, 8 Eq. 290.

(h) 5 B. & Ad. 504; see *Baron v. Husband*, 4 B. & Ad. 611; *Henderson v. Rothschild*, 33 Ch. D. 459; affirmed 56 L. J. Ch. 471.

balance of C.'s, which he had in hand, and send them to the proprietors as their shares of the profits. On one occasion £23 were due to the plaintiff, and the defendant made up a packet purporting to contain that sum, and sent it to the plaintiff. The packet only contained £20, and the action was brought for the difference. No sum of money was expressly given to the defendant by C. for the plaintiff, but after the action was brought the defendant admitted that he had had the money of C., but said he had sent it to the plaintiff. The plaintiff was nonsuited on the ground that there was no privity between him and the defendant; and a rule to set aside the nonsuit was afterwards refused, Parke, J., observing: "If it had been proved that the defendant had, as it were, attorned to the plaintiff and agreed to hold the money for his use, and not subject to the direction of C., the case would have been different."

In Cases of Tort—Criminaliter.

We have seen in the preceding chapter that a master is in many cases liable to answer criminally for the acts of his servants. Such liability on the part of the master does not, however, by any means, always involve the exemption of the servant from a similar liability to answer *criminaliter* for his own acts, although performed by him in the discharge, or supposed discharge, of his duty to his master, or in obedience to his master's commands. In criminal matters it is a general rule that every person must answer for his own acts, and the command of no person can excuse an illegal act. A servant, therefore, is not, generally speaking, excused from liability to answer criminally for any violation of the law which he may commit, on the ground that he was only acting in obedience to his master's commands (i). This is so obviously the case in regard to offences which are *mala in se*, that no more need be said upon the subject. But where the illegal act charged is merely *malum prohibitum*, the fact that the servant was acting in obedience to his master's commands would be strong evidence to rebut that *prima facie* inference of the existence of a vicious mind, which generally arises from the mere doing an illegal act; and in such cases it may sometimes happen that in this way the command of the master may, in effect, exempt the servant from criminal responsibility for the consequences of illegal acts done in obedience to his master's orders.

Thus, where (k) on the trial of an indictment under 7 & 8 Geo. IV. c. 30, s. 6, for maliciously obstructing an airway belonging to a mine,

(i) 1 Hawk. P. C. 3; 1 Hale P. C. 44, 516; 4 Blackst. Com. 28.

(k) *R. v. James*, 8 C. & P. 131. And see *R. v. Bleasdale*, 2 Carr. & K. 768; where Erle, J., said, "If a man does by means of an innocent agent an act which amounts to a felony, the employer, and not the innocent agent, is the person accountable for that act."

with intent to hinder and delay the working of the mine, it appeared that the defendants had acted under the orders of P., the lessee of an adjacent mine, and it was contended by the counsel for the prosecution, that although the defendants were acting under P.'s orders, yet an order to do wrong afforded no justification; Lord Abinger, C.B., inquired: "If a servant did this by his master's order, and supposing *bonâ fide* that the master had a right to order it to be done, would it not be too much to say that the servant is answerable as a felon for doing the thing maliciously when the malice, if there is any, is his master's, and not his own?" Upon which, the counsel for the prosecution said, "Suppose a master ordered his servant to shoot a man, that would be no excuse for the servant if he did it." "But," said Lord Abinger, "that is an act which is *malum in se*. But if a master having a doubt or no doubt of his own rights, sets his servants to build a wall in a mine, they would, if he proved to have no right, be all liable in an action of trespass, but it would not be felony in the servants. The rules respecting acts *mala in se* do not apply. If a master told his servant to shoot a man, he would know that that was an order he ought to disobey. But if the servant *bonâ fide* did *these* acts, I think they do not amount to an offence within this statute. If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so, acting *bonâ fide*, I am of opinion that that is not felony in them even if, in so doing, they obstruct the airway of a mine. What I feel is this; that if these men acted *bonâ fide* in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this Act of Parliament. But if either of these men knew that it was a malicious act on the part of his master, I think then that he would be guilty of the offence charged." The prisoners were acquitted.

Where a servant who was not qualified went out coursing with a master who was qualified, it was held that the servant could not be convicted for using dogs to kill and destroy game (*l*). And so an unqualified person who set traps to destroy game by order of his master, who was qualified, was held not liable to the penalties imposed by 5 Ann. c. 14 (*m*). But where an unqualified servant went out shooting with a master who was qualified, and fired a gun and shot game for him, he was held liable to the penalty imposed by 5 Ann. c. 14, for keeping and using a gun to kill game without a qualification (*n*), Bayley, J., saying: "The principle upon which the two former cases proceeded was, that the using the greyhounds was the act of the owner and

(*l*) *R. v. Taylor*, 15 East, 460; see also *Lewis v. Taylor*, 16 East, 49; *Hudson v. Foot*, 10 Ir. C. L. R. 509.

(*m*) *Walker v. Mills*, 2 Br. & B. 1; see also *Spicer v. Barnard*, 28 L. J. M. C. 176; *Padwick v. King*, 29 L. J. M. C. 42, where the right of a tenant to kill rabbits was held to justify his servants in so doing by his direction.

(*n*) *Ex parte Sylvester*, 9 B. & C. 61.

master, and not of those who accompanied him. So, also, the trap being set by the master's orders and in his presence, must be taken to have been set by him. But we cannot say that of using the gun, neither his hand nor his skill was applied to it. If we were to hold that the firing of the gun was the act of the master, he might in the same manner use twenty guns at the same time. I think we must consider the gun to have been used by the person who actually fired it, and, if so, the cases cited are inapplicable, and there can be no doubt that S. was properly convicted."

The Pharmacy Act, 1868 (31 & 32 Vict. c. 121), imposes a penalty, by sect. 15, on any person who shall "sell" poisons without being a duly registered chemist, and under this section an unregistered assistant of a duly registered chemist has been held liable (o). The Poisons and Pharmacy Act, 1908 (8 Edw. VII. c. 55), s. 2 (1), in the case of a certain class of poisons, enables persons who have obtained a licence to sell, although not qualified chemists. Here also a licensed person cannot shield an unlicensed assistant (p).

So, too, under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), a servant of a dairy company has been convicted under sect. 6, which imposes a penalty on any person who shall "sell" to the prejudice of the purchaser, any article of food not of the nature, substance and quality of the article demanded by the purchaser (q).

But a servant selling liquor, the property of his master, by his master's order, was held not to come within section 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), by which it was forbidden that any person should sell by retail any intoxicating liquor without being duly licensed (r).

Under the Inland Revenue Act, 1867 (30 & 31 Vict. c. 90), s. 17: "If any person shall solicit, take or receive any order for spirits, wine or other article, for the dealing in, retailing or selling whereof an excise licence is by law required, without having in force a proper excise licence authorising him so to do," he shall forfeit certain penalties; but a proviso excepts "a *bonâ fide* traveller taking orders for goods which his employer is duly licensed to deal in or sell." A traveller was held not necessarily excluded from relying upon this proviso by reason merely that he had a regular office where he received orders for spirits, and from which he forwarded such orders to his employers (s).

But a secretary to a watch club, who received from the members of the club subscriptions which he forwarded to a watchmaker holding

(o) *Pharmaceutical Society v. Wheeldon*, 24 Q. B. D. 683. But an agent who simply receives an order and forwards it to his principal for acceptance is not a seller within this section: *Pharmaceutical Society v. White*, [1901] 1 K. B. 601.

(p) *Pharmaceutical Society v. Nash*, [1911] 1 K. B. 520.

(q) *Hotchin v. Hindmarsh*, [1891] 2 Q. B. 181.

(r) *Williamson v. Norris*, [1899] 1 Q. B. 7.

(s) *Stuchbery v. Spencer*, 55 L. J. M. C. 141.

an excise licence to deal in plate, was held not to come within the proviso, he himself having no excise licence, and being paid by the watchmaker a commission upon the amount he collected (*t*).

The Pedlars Act, 1871 (34 & 35 Vict. c. 96), which enacts that no person shall act as a pedlar without having a certificate, contains an exemption in sect. 23 in favour of "commercial travellers or other persons selling or seeking orders for goods, wares, or merchandise to or from persons who are dealers therein and who buy to sell again, or selling or seeking orders for books as agents authorised in writing by the publishers of such books."

The Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 5, empowers a servant to travel with his master's licence and trade for his master's benefit.

It has also been held, that a servant is liable to the penalties imposed by the Thames Watermens Act (*u*), upon any person not being a freeman of the Watermen's Company, who shall act as a waterman, &c., on the Thames, although he was working for and paid by the owner of the barge at a fixed weekly salary (*x*).

Again, a sheriff's officer has been held liable to an attachment for extortion (*y*).

And a servant who managed a place of public resort was convicted for aiding and abetting his master in harbouring prostitutes under 11 & 12 Vict. c. 43, s. 5 (*z*).

Where a shopman to a jeweller was indicted for obtaining money by false pretences, he having sold a chain, &c., which was hung in the window, marked "fine gold," when it was not gold, Alderson, B., said the indictment would not lie without showing guilty knowledge on the part of the defendant, who was merely acting as shopman, and the jury having found that there was no guilty knowledge, the prisoner was acquitted.

"If," said the learned Baron, "the master had been indicted, the evidence might apply, because the jury would infer that he was aware of the quality of the articles that he was selling, but it was different in the case of a shopman. Although, undoubtedly, a gross fraud, it did not constitute an indictable offence" (*a*).

There are also many cases which may properly be mentioned in this place, but to which it is unnecessary to advert at any length, as they scarcely come within the scope of the present work, in which servants may be liable to indictment for culpable neglect of the duty undertaken by them towards their employer, where that duty also involved

(*t*) *Killick v. Graham*, [1896] 2 Q. B. 196.

(*u*) 7 & 8 Geo. IV: c. lxxv.

(*x*) *R. v. Tibble*, 4 E. & B. 888; *Skittrell v. Showell*, 59 L. J. M. C. 26.

(*y*) *Masters v. Lowther*, 11 C. B. 948.

(*z*) *Wilson v. Stewart*, 32 L. J. M. C. 198.

(*a*) *R. v. Lamade*, Centr. Cr. Court, Feb. 4th, 1853.

a duty to the public. Such, for instance, as the driver of a carriage or a captain of a vessel, who, by negligent driving or navigation, causes the death of any person. In such cases, though the master may be liable in a civil action for the consequences of his servant's negligence, yet the servant must answer criminally for his own personal negligence (*b*). The neglect of duty must be immediately connected with the death (*c*).

In a case, therefore, in which the ground bailiff of a mine, whose duty it was to cause proper air-headings to be put up to prevent the accumulation of noxious gases, neglected to do so, and an explosion of fire-damp took place, which killed a person, for whose manslaughter he was indicted; Maule, J., in summing up, told the jury that if they were satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made, and that a man using reasonable diligence would have had it done, and that by the omission the death of the deceased occurred, they ought to find the prisoner guilty of manslaughter (*d*).

Again, where a banksman, whose duty it was to place a stage on the mouth of a shaft to receive a loaded truck run down to it on a tramway, neglected to place the stage, in consequence of which the truck fell down the shaft and killed a workman, the banksman was held guilty of manslaughter (*e*). In that case Lord Campbell said: "It was the duty of the prisoner to place the stage on the mouth of the shaft. The death of the deceased was the direct consequence of the omission of the prisoner to perform this duty. If the prisoner, of malice aforethought, and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common law form of an indictment for murder by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the law would infer this duty (*f*). But it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child), this is a case of murder. If the omission was not malicious and arose from negligence only, it is a case of manslaughter. It has been held that to make the captain of a vessel guilty of

(*b*) *R. v. Allen*, 7 C. & P. 153; *R. v. Green*, *ib.* 156, where the captains of steamers were indicted for the manslaughter of persons killed by being run down by the steamers; but were acquitted, as there was no proof of any personal act; and see *R. v. Taylor*, 9 C. & P. 672; *R. v. Ledger*, 2 Fost. & F. 857 (station-master); *R. v. Trainer*, 4 F. & F. 105 (engine-driver and fireman); *R. v. Birchall*, 4 F. & F. 1087; *R. v. Gray*, 4 F. & F. 1098.

(*c*) *R. v. Pocock*, 17 Q. B. 34.

(*d*) *R. v. Haines*, 2 Carr. & K. 368.

(*e*) *R. v. Hughes*, 26 L. J. M. C. 202.

(*f*) *R. v. Edwards*, 8 C. & P. 611; see 3 Russ. on Cr. (6th ed.), 95.

manslaughter in causing a person to be drowned in running down a boat, proof of a mere omission on his part to do the whole of his duty is not sufficient (*g*). But there is no authority for the position that without an act of commission there can be no manslaughter; and, on the contrary, the general doctrine seems well established that what constitutes murder being by design and of malice prepense constitutes manslaughter when arising from culpable negligence."

Moreover, many instances are to be found in the books of cases in which servants and workmen have been joined with their masters and employers in indictments for nuisances (*h*).

The performance of their duties to their masters by servants of railway companies is enforced by Act of Parliament. Thus in the Railway Regulation Act, 1842 (5 & 6 *Vict. c.* 55), there is, for the protection of the public, inserted a provision for the punishment of servants of railway companies who are guilty of misconduct. By that Act it is enacted:—

Sect. 17. "It shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine-driver, waggon-driver, guard, porter, servant or other person employed by the said or by any other railway company, or by any other company or person in conducting traffic upon the railway belonging to the said company, or in repairing or maintaining the works of the said railway, who shall be found drunk while so employed upon the said railway; who shall commit any offence against any of the bye-laws, rules or regulations of the said company; or who shall wilfully, maliciously or negligently do, or omit to do, any act whereby the life or limb of any person passing along or being upon such railway, or the works thereof respectively, shall be or might be injured or endangered; or whereby the passage of any engines, carriages or trains shall be or might be obstructed or impeded, and to convey such engine-driver, guard, porter, servant or other person so offending, or any person counselling, aiding or assisting in such offence, with all convenient dispatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this Act; and every such person so offending, and every person counselling, aiding or assisting therein as aforesaid, shall, when convicted upon the oath of one or more credible witness, or witnesses, before such justice as aforesaid (who is hereby authorised and required upon complaint to him made upon oath, without information in writing, to take cognisance thereof, and to act summarily in the premises), in the discretion of such justice be imprisoned, with or without hard labour, for any term not exceeding

(*g*) *R. v. Allen*, 7 C. & P. 153.

(*h*) See, *e.g.*, *R. v. Pease*, 4 B. & Ad. 30; *R. v. Scott*, 3 Q. B. 513; *R. v. Charlesworth*, 16 Q. B. 1012; *R. v. Betts*, 16 Q. B. 1022; *R. v. Sharpe*, 3 Railw. Cas. 33.

two calendar months; or, in the like discretion of such justice, shall, for every such offence, forfeit to Her Majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labour, as aforesaid, [for such period, not exceeding two calendar months, as such justice shall appoint, such commitment to be determined on payment of the amount of the penalty, and every such penalty shall be returned to the next ensuing Court of quarter sessions in the usual manner" (i).]

Also the Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c. 20*), ss. 124, 125, makes the owners of engines, &c., brought on the railway liable to the company for damage done by the servants of such owners, but enables the owners to recover from their servants in the same way as the company recover from the owners.

Clauses are also to be found in various Acts of Parliament subjecting clerks and servants to punishment for offences committed against those Acts.

Thus, the Larceny Act, 1916 (6 & 7 *Geo. V. c. 50*), provides by sect. 20 (1) that every person who "being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company," shall be guilty of a misdemeanor.

Again, by the Forgery Act, 1913 (3 & 4 *Geo. V. c. 27*), s. 2, forgery of the following (*inter alia*) documents, if committed with intent to defraud, shall be felony and punishable with penal servitude:—

"Any valuable security or assignment thereof or endorsement thereon, or, where the valuable security is a bill of exchange, any acceptance thereof"; or "any document of title to goods or any assignment thereof or endorsement thereon."

By sect. 6 the altering of any forged document is similarly punishable.

And the Offences against the Person Act, 1861 (24 & 25 *Vict. c. 100*), enacts:—

Sect. 35. "Whosoever having the charge of any carriage or vehicle shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour."

By the Sunday Observance Act (29 *Car. II. c. 7*), "No tradesman,

(i) The words in brackets in this Act (probably by an oversight) not repealed by 47 & 48 *Vict. c. 43*. See also Railway Regulation Act, 1840 (3 & 4 *Vict. c. 97*), ss. 13 and 14.

artificer, workman or labourer or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day or any part thereof (works of necessity and charity only excepted)," and every person of the age of fourteen years and upwards, offending in the premises, is liable for every such offence to forfeit the sum of five shillings (k).

Clauses also are to be found in various other Acts of Parliament subjecting workmen and servants to penalties for offences against the Act committed whilst in the discharge of their duty to their employers.

Thus in sect. 200 of the London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), there is a provision that if any workman, labourer, servant, or other person employed in or about any building, wilfully, and without the privity or consent of the person causing the work to be done, does anything in or about such building contrary to the provisions of that Act, he shall incur certain penalties.

A distinction of considerable importance must here be adverted to, which obtains between civil and criminal proceedings for the consequences of negligence. In civil proceedings, as we have seen, no person can recover damages against a master for the negligence of his servant if he has by his own negligence contributed to or caused the injury complained of. But in criminal proceedings the converse of that proposition is true: and it is no answer to a criminal charge, as of manslaughter, that the deceased by his own negligence or improper conduct, or by being deaf or drunk, contributed to his own death (l).

In Cases of Tort—Civiliter.

It is a general rule in cases of tort, that all persons concerned in the wrong are liable to be charged as principals. It was said in *Sands v. Child* (m), "that the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact." A servant, therefore, can in no case excuse himself from liability to an action founded upon a misfeasance or positive wrong done to another person, upon the ground that he acted merely in obedience to his master's orders or for his master's benefit. Thus a surveyor to a highway board was held liable in an action of trespass for removing the lock from a gate placed across a highway running through land occupied by the plaintiff, though in removing the lock he was only acting in pursuance of instructions given him by the board; and the fact that he was under a statutory duty to obey the

(k) The words "workman or labourer" are intended to cover the case of persons in the employment of others, but it is doubtful whether agricultural labourers are within this enactment: *R. v. Silvester*, 33 L. J. M. C. 79; or barbers' assistants: *Palmer v. Snow*, [1900] 1 Q. B. 725.

(l) *R. v. Swindall*, 2 C. & K. 230.

(m) 3 Lev. 352. See *Buron v. Denman*, 2 Ex. 167, cited *post*, p. 279, note (m).

orders of the board did not excuse him if in obeying their orders he did an unlawful act (n).

And the engineer to a drainage board was held liable (o) to an action of trespass where certain works were being executed by a contractor pursuant to a contract with the board and under the personal superintendence of the engineer, and according to plans prepared by him. The engineer personally directed and instructed the contractor, and some of the works thus executed were executed on the plaintiff's land and were a trespass.

In *Breay v. Royal British Nurses' Association* (p) the facts were as follows: The defendants were an incorporated society and published a newspaper on nursing, one of the members of the association being employed as honorary editor. In respect of an article published in this newspaper the plaintiff brought an action of libel, but he chose to sue, not the association, but the editor solely. The association thereupon passed a resolution that their funds be used in defending the action against the editor and defraying costs and expenses incurred therein. The plaintiff then obtained an order from North, J., restraining the association from expending their funds in this way; but the Court of Appeal, reversing the decision of North, J., held that as the editor had acted within the scope of her authority, and on the instructions of the body having the control of the newspaper, the association had a common interest with her in defending the action, and were justified in assisting her with their money in her defence.

But for mere nonfeasance or omission of duty, a servant is not liable to answer in a civil action at the suit of third persons, but only to his own master (q), who, in accordance with the maxim already alluded to, "*Respondeat superior*," is liable to answer for his servant's neglect (r). This distinction between misfeasance and nonfeasance was thus stated by Lord Holt, in his celebrated judgment in *Lane v. Cotton* (s): "It

(n) *Mill v. Hawker*, L. R. 10 Ex. 92.

(o) *Monks v. Dillon*, 12 L. R. Ir. 321, following *Wilson v. Peto*, 6 Moore C. P. 47, where a contractor's managing clerk, who merely superintended for his master the execution of the works, was held liable for the obstruction of the plaintiff's lights caused thereby. See also *Thompson v. Gibson*, 7 M. & W. 456.

(p) *Breay v. Royal British Nurses' Association*, [1897] 2 Ch. 272.

(q) *Gidley v. Lord Palmerston*, 3 Bred. & B. 275, 285.

(r) So the servant of a carrier is not generally responsible for the loss of a parcel to the owner, who should look to the master: *Williams v. Cranston*, 2 Stark. 82; *Cavenagh v. Such*, 1 Price, 328, as the duty (the breach of which gives the right of action) is towards the master. See *Marshall v. York, Newcastle, and Berwick Railway Co.*, 11 C. B. 655; where it was held that a servant might maintain an action against carriers for loss of his luggage, although his master paid the fare. See also *Collett v. London and North Western Railway Co.*, 16 Q. B. 984; *Longmeid v. Holliday*, 6 Ex. 761; *Dalyell v. Tyrer*, 28 L. J. Q. B. 52; *Foulkes v. Metropolitan District Railway Co.*, 5 C. P. D. 157. It has been held that a carrier's servant might sue a person who sent a dangerous article, nitric acid, to be carried, not properly labelled, which burst and injured the plaintiff: *Farrant v. Barnes*, 11 C. B. (N. S.) 553. In such a case, if the servant dies, *actio personalis moritur cum persona*: *Pulling v. Great Eastern Railway Co.*, 9 Q. B. D. 110.

(s) 12 Mod. 473, 488.

was objected at the bar that they have this remedy against Breese (the servant). I agree if they could prove that he took out the bills they might sue him for it: so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him, for they must consider him only as a servant, and then his neglect is only chargeable on his master or principal: for a servant or deputy *quatenus* such cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrongdoer.”

Upon the principle that a servant is liable for a misfeasance, the defendant was held liable in *Perkins v. Smith* (t), which may be regarded as a leading case upon this subject. In that case the facts were shortly these: The plaintiff was assignee of a bankrupt, and the defendant servant and riding clerk to a creditor of the bankrupt; the defendant went to the bankrupt's shop to try and get his master's money and found it shut up, but the bankrupt delivered to the defendant certain goods, for which the defendant gave a receipt in his master's name, and then sold the goods for his master's use; upon which the bankrupt's assignee brought an action of trover against the servant. It was objected that the action was improperly brought against the servant, who acted wholly in this matter for his master, and that the conversion, which is the gist of the action of trover, was found to be to the use of the master. But after two arguments at the bar, the Court gave judgment for the plaintiff, Lee, C.J., saying: “The point is whether the defendant is not a tort-feasor, for, if he is so, no authority that he can derive from his master can excuse him from being liable in this action. . . . The act of selling the goods is the conversion, and whether to the use of himself or another, it makes no difference. I am very well satisfied that this servant has done wrong, and that no authority that could be derived from his master, before or after the fact, can excuse him” (u).

The rule thus laid down was again acted on in *Stephens v. Elwall* (x), which was also an action of trover by the assignees of a bankrupt for goods which the bankrupt had sold after his bankruptcy to D., to be paid for by bills on H., for whom the goods were bought. H. was in America, and the defendant was his clerk; the goods were delivered to the defendant, who sent them to H. in America. At the trial it was contended, on the authority of *Perkins v. Smith*, that the defendant was liable, although he merely acted as clerk to

(t) 1 Wils. 328; *Symonds v. Atkinson*, 1 H. & N. 146; and see *Michael v. Alestree*, 2 Lev. 172, ante, p. 210, where the action (for negligent driving) was brought against both master and servant.

(u) If a servant acts as a mere conduit pipe for communicating an authority from his master to another person, *semble* he would not render himself liable: *Bennett v. Bayes*, 29 L. J. Ex. 224.

(x) 4 M. & S. 259; see *Greenway v. Fisher*, 1 C. & P. 190.

H.; the judge, however, thought otherwise, and so directed the jury, who found a verdict for the defendant. But in the following term a new trial was granted, Lord Ellenborough, C.J., saying: "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it. And the Court is governed by the principle of law and not by the hardship of any particular case. For what can be more hard than the common case in trespass where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but, if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?" (y).

In *Hollins v. Fowler* (z), Blackburn, J., in giving his opinion to the House of Lords, said that no case harder than that of the defendant in *Stephens v. Elwall* could well be imagined, unless perhaps that of a sheriff who seized goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. The House of Lords in this case approved of the decision in *Stephens v. Elwall*, and held that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

Similar principles were again enforced in *Cranch v. White* (a). That was an action of trover for a bill of exchange which had been intrusted by the plaintiff to one Roberts to get discounted. Roberts owed the defendant's mother, who was a coal merchant, and whose clerk the defendant was, a large sum for coals, and instead of getting the bill discounted, Roberts indorsed it and placed it in the hands of

(y) As to the recovery of contribution, see *Merryweather v. Nixan*, 8 T. R. 186; 1 Smith's L. C. 398, where the subsequent cases will be found collected. As to whether the Court would interfere to protect the servant, see *Gregory v. Slowman*, 1 E. & B. 360.

(z) L. R. 7 H. L. 757. These cases were followed in *Winter v. Banks*, 84 L. T. 504. In that case a gig which had been stolen was found in the possession of B. The police took possession of the gig while B. was tried for larceny. B. was acquitted. Thereupon the defendant in the action, who was a police officer, acting on the instructions of his superior officer, delivered back the gig to B. In an action of trover by the true owner of the gig, the police officer was held liable. In *Turner v. Hockey*, 56 L. J. Q. B. 301, an auctioneer, who in the ordinary course of business had sold by public auction for A. goods ostensibly belonging to A., but really belonging to B., and had, without notice, paid over to A. the proceeds of the sale, was held to be not guilty of a conversion. But that case has been adversely commented on by Romer, J., in *Barker v. Furlong*, [1891] 2 Ch. 172, 183.

(a) 1 Bing. N. C. 414; and see *Davies v. Vernon*, 6 Q. B. 443.

the defendant, who carried it to the credit of Roberts's account with his, the defendant's, mother. The defendant, when apprised of Roberts's fraud, refused to deliver up the bill; but it was held that by so doing he rendered himself liable to the action of trover which was brought against him, although it was contended on his behalf that the action should have been brought against his mother; Tindal, C.J., saying that any justification of the defendant's conduct, as the agent of his mother, fell to the ground on the authority of *Perkins v. Smith* and *Stephens v. Elwall*.

And again, in *Powell v. Hoyland* (b), where the defendant, acting on behalf of Y. & Co., obtained from the plaintiff certain bills of exchange under circumstances which did not entitle Y. & Co. to them. These circumstances were unknown to the defendant at the time he obtained the bills from the plaintiff, but he was afterwards, and before he had delivered the bills to Y. & Co., informed of the facts, and told that his employers had no right to the bills. In spite of this information he refused to give the bills to the plaintiff, and delivered them to his employers; and it was held that by so doing he became liable to an action of trover; Lord Wensleydale observing, "There is no doubt that, though the defendant did not receive the bills for himself but as the agent of Y. & Co., he may be liable in an action of trover, if the facts show a conversion by him;" which they were held to do.

Where, however, a servant merely refuses to deliver goods received from his master to any other person, without his master's orders, such refusal has been held not to amount to a conversion by the servant, and he has accordingly been held not liable to an action of trover (c).

Upon this distinction depends the old case of *Mires v. Solebay* (d). There the defendant, by command of his master, drove some sheep, which the plaintiff claimed to have purchased, on to his master's land, and then refused to deliver them to the plaintiff: he was held not liable in trover for so doing; "for it being in obedience to his master's command, though he had no title, yet he shall be excused."

So where (e) the defendant, who was servant to an insurance company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the

(b) 6 Ex. 67.

(c) If he refuse to give up goods to the rightful owner, and rely on his master's title, he may be liable in trover; *aliter*, if he merely give a qualified refusal and refer to his master: *Lee v. Robinson*, 25 L. J. C. P. 249; S. C. *nom.* *Lee v. Bayes*, 18 C. B. 599, 607. See also *Hollins v. Fowler*, L. R. 7 H. L. 757, where the grounds on which trover is maintainable are discussed.

(d) 2 Mod. 242.

(e) *Alexander v. Southey*, 5 B. & Ald. 247; and see *Grylls v. Davies*, 2 B. & Ad. 514. In *Day v. Bream*, 2 M. & Rob. 54, a porter who, in the course of his business, delivered parcels containing libellous publications, was held not liable to an action for libel, as he was ignorant of the contents of the parcel. And in *Emmens v. Pottle*, 16 Q. B. D. 354, it was held that under certain circumstances it is possible for a news-vendor who has sold a newspaper containing a libel to prove that he has not published the libel.

plaintiff's house, and which had been carried to the warehouse by the servants of the company, and, upon the plaintiff demanding the goods, said he could not deliver them without an order from the company, he was held not liable to an action of trover, as the refusal to deliver the goods without an order from his master did not amount to a conversion of the goods.

"If," said Holroyd, J., "we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house and to ask his servant to deliver goods to him, and the servant were to refuse to do so unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case the goods came into the defendant's possession lawfully, and the refusal is only till an order is obtained from the defendant's employers. In *Perkins v. Smith* the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now it is clear that the authority of the master would not amount to a defence, of that which was altogether a tortious act of the servant. The case of *Mires v. Solebay* is an authority in point."

But a warehouseman (*f*) who refused to deliver goods out of his warehouse to the rightful owner, without the direction of the person from whom he (the warehouseman) received them, was held liable to an action of trover at the suit of the rightful owner, as such refusal was considered to be sufficient evidence of conversion. In that case, however, the defendant was a warehouseman, and it was considered that the defendant had by his conduct identified himself with the person from whom he received the goods; whereas in *Alexander v. Southey* the defendant was merely a servant, and referred the parties to his master (*g*).

Where a servant of the law refused to give up goods which had been attached by legal process, saying that they were in the custody of the law, his doing so was held not to amount to a conversion so as to render him liable to an action at the suit of the owner of the goods (*h*). There, however, the defendant remained passive; had he taken upon himself to decide, he might perhaps have rendered himself liable (*i*).

We have already seen in the preceding chapter that if a servant is guilty of a fraud in transacting his master's business, the master may be liable to an action at the suit of the party defrauded. And the servant also is liable and cannot shelter himself under his master's responsibility, although authorised by his master to commit the fraud.

(*f*) *Wilson v. Anderton*, 1 B. & Ad. 450.

(*g*) See *Catterall v. Kenyon*, 3 Q. B. 310, per Patteson, J., at p. 315.

(*h*) *Verrall v. Robinson*, 2 C. M. & R. 495.

(*i*) *Catterall v. Kenyon*, 3 Q. B. 310.

Upon this principle the House of Lords held that the manager and secretary of a joint stock company, who had furnished detailed statements and were cognisant of a fraudulent report issued and signed by directors only, were liable to third persons who on the faith of such report had become shareholders in the company (*k*).

The Lord Chancellor (Lord Westbury) there said: "All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another; and the reason is plain, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of a fraud."

Although a servant who actually participates in or authorises such torts as assault, trespass, or nuisance may be liable as a joint participant in the tortious wrong, there is no decision on record which makes a servant liable in tort for procuring a breach of his master's contract with another. On the contrary, it has been held that "if a servant acting *bonâ fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken" (*l*).

We have, while treating of the liability of a master for the tortious acts of his servant, seen that an exception to his general liability in such cases is established in the case of servants of the Crown in a superior capacity, who are not in general responsible for the tortious acts of their subordinate officers. It by no means follows, however, that such subordinate officers are not themselves responsible for their own misdeeds. On the contrary, the exemption of their superior officers from liability to answer for their misfeasances, would seem to offer an *à fortiori* reason for holding them responsible for their own acts, otherwise wrongs committed by them might go altogether unredressed, since, upon public grounds, Governments are not generally responsible for the misfeasances of their officers (*m*).

(*k*) *Cullen v. Thomson's Trustees and Kerr*, 4 Macq. 424, 433. It has indeed been laid down in 1 Roll. Abr. 95, that if the servant of a taverner sell bad wine knowingly, no action lies against him, for he only did it as a servant.

(*l*) *Said v. Butt*, [1920] 3 K. B. 497.

(*m*) In *Feather v. Reg.*, 35 L. J. Q. B. 200, 209, Cockburn, C.J., said that "no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act" done by authority of the Crown. See also *Tobin v. Reg.*, 16 C. B. (N. S.) 310; and *Raleigh v. Goschen*, [1898] 1 Ch. 73. But where the captain of a man-of-war burnt the barracks of a Spanish slave dealer, a foreigner, and this act was subsequently ratified by the ministers of State, it was held that the captain was not liable to an action at the suit of the Spaniard, who had his remedy, such as it was, against the Crown only: *Buron v. Denman*, 2 Ex. 167; and see per Cockburn, C.J., in *Feather v. Reg.*, *supra*, at p. 209. In *Bradlaugh v. Gossett*, 12 Q. B. D. 271, it was held that no action will lie against an officer of the House of Commons for acts done under an order of the House with the execution of which he is charged, by a resolution of the House, although such resolution may forbid a member of the House to do that which by the law of the land he has a right to do.

Accordingly, in the cases before referred to, of actions against the postmaster-general for the loss of letters, we find it admitted on all hands that the servant, through whose negligence the letters were lost, would have been liable to actions at the suit of the parties injured, and the only question made was, as to the liability of the master.

“As to an action on the case lying against the party really offending,” said Lord Mansfield (n), “there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post-office loses any of them, he is answerable, so is the sorter in the business of his department, so is the postmaster for any fault of his own.”

Upon this principle, in several cases, the deputy postmaster has been held liable to an action for the non-delivery of letters which it was his duty to have delivered, as well as the penalty for detaining letters imposed by statute (o).

There is also a large class of cases, which may be conveniently noticed in this place, in which public officers in a merely ministerial capacity (p) have been held liable to answer in an action at the suit of the party injured, for negligence in the performance of the duties cast upon them. Thus, for instance, a sheriff, whose duty in many cases, such as the receipt, execution and return of writs, is that of a merely ministerial officer, is liable to be sued by the party aggrieved for any act of irregularity, misfeasance or nonfeasance in executing writs (q).

A returning officer at an election of members of Parliament was held by the House of Lords, in the great case of *Ashby v. White*, to be liable to an action for maliciously refusing to receive the vote of a person entitled to vote (r).

And the case of *Perring v. Harris* (s), which was an action against an overseer of the poor, for maliciously omitting to insert the plaintiff's name in the poor-rate, whereby she was prevented from obtaining a licence to sell beer, was one of a similar nature.

And so a collector of customs, appointed by the commissioners under the statute 3 & 4 Will. IV c. 51, was held liable (t) to an action at the suit of the party grieved, for nonfeasance in the exercise of his office,

(n) In *Whitfield v. Lord Le Despenser*, Cowp. 754, 765.

(o) *Stock v. Harris*, 5 Burr. 2709; *Barnes v. Foley*, *ibid.* 2711; *Rowning v. Goodchild*, *ibid.* 2716.

(p) But no action lies against persons acting in a judicial capacity: *Groenvelt v. Burwell*, 1 Lord Raym. 454; *Miller v. Seare*, 2 W. Bl. 1141; *Doswell v. Impey*, 1 B. & C. 163.

(q) Bac. Abr. Sheriff, M.; Watson's Sheriff, 117. As to the position of an under-sheriff who acts in the place of a sheriff who has died, see *Gloucestershire Banking Co. v. Edwards*, 20 Q. B. D. 107; *Cameron v. Reynolds*, Cowp. 403.

(r) 2 Lord Raym. 938; 1 Smith's L. C. 240; and see *Cullen v. Morris*, 2 Stark. 577.

(s) 2 M. & Rob. 5.

(t) *Barry v. Arnaud*, 10 A. & E. 646. In *Barrow v. Arnaud*, 8 Q. B. 595, it was not even suggested that the defendant was not liable to be sued, if the duty claimed in that case was excessive.

viz., for refusing to sign a bill of entry of certain goods without payment of an excessive duty. In giving judgment in that case Lord Denman, C.J., said: "The defendant is a public ministerial officer, and being so, is responsible for neglect of his duty to any individual who sustains damage by such neglect. *Schinotti v. Bumsted* (u) is a strong authority to this effect; the facts in that case respecting the commissioners of the lottery tending much more to raise a doubt whether the defendants had not a judicial discretion intrusted to them; and in *Lacon v. Hooper* (x), which was an action against the commissioners of customs for not making a certain order for the payment of money to which the plaintiffs claimed to be entitled under an Act for the encouragement of the South Sea whale fishery, it was not questioned but that even they would be liable to the action if the neglect of duty were made out."

Where an Act of Parliament provided that no matter or thing done, or contract entered into, by the commissioners of sewers, or by any clerk, surveyor or other officer or person acting under their direction, should, if the matter or thing were done or the contract were entered into *bonâ fide* for the purpose of executing the Act, subject them personally to any action or liability whatever, and any expense incurred by them was to be borne and paid out of the funds under the control of the commissioners: it was held that the effect of this was to absolve from personal liability to an action persons who *bonâ fide* did some act under the direction of the commissioners which but for the clause would subject them to an action (y).

(u) 6 T. R. 646.

(x) 6 T. R. 224.

(y) *Ward v. Lee*, 26 L. J. Q. B. 142.

CHAPTER VII.

THE SERVANT'S CHARACTER.

The Character—Defamation.

THE giving a character of a servant is one of the most ordinary communications which a member of society is called on to make, but it is a duty of great importance to the interests of the public: and in respect of that duty a party offends grievously against the interests of the community in giving a good character where it is not deserved, or against justice and humanity in either injuriously refusing to give a character, or in designedly misrepresenting one to the detriment of the individual (a).

It is clear, however, that in the absence of any specific agreement to that effect, there is no legal obligation (b) binding a person who has retained another as a servant to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so. Where, therefore (c), an action was brought by a servant against her master for wholly refusing to give her any character whatever on dismissal, by reason of which refusal one S. refused to hire her, Lord Kenyon said, the action could not be supported; that "in the case of domestic and menial servants there was no law to compel the master to give the servant a character; it might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it."

If a master knowingly give a false character as to the honesty of a servant to a person about to hire him, and the servant afterwards rob his new master, the new master may, in an action for the deceit,

(a) Starkie on Slander, vol. i. 293.

(b) In the case of a seaman, the master of the ship from which he is discharged is under a statutory duty of giving him a certificate of discharge, and in some cases of making a report of his character, a copy of which may be indorsed on the certificate, or stating reasons for declining to give any opinion thereon: Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 128, 129. No action will lie for refusal of a certificate of discharge; the section itself provides the only remedy: *Vallance v. Falle*, 13 Q. B. D. 109.

(c) *Carrol v. Bird*, 3 Esp. 201. In *Pullman v. Hill & Co.*, [1891] 1 Q. B. 524, Lord Esher, M.R., said: "It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so."

recover from the former master the damages he has sustained in consequence of such false character having been given (*d*).

Moreover, a criminal responsibility may be incurred by a person giving a false character (*e*).

But in the absence of fraud it will not be enough for the plaintiff to show that the defendant has been guilty of negligence, however gross. The question of liability for negligence cannot arise at all until it is established that the man who is alleged to have been negligent owed some duty to the person who seeks to make him liable for negligence. The knowledge of the defendant that the plaintiff would or might act upon his statement does not create any duty in him towards the plaintiff, and in the absence of contract he will not be liable for what he may have said, unless he said it fraudulently (*f*).

Where a master does give a discharged servant a character, he may perhaps in so doing make a statement which the servant regards as defamatory (*g*) and uses as the foundation of an action of libel or slander.

It may be stated generally that such a statement, if made without "express malice," is a privileged communication, so that the master will not be liable to the servant in respect of it. That is to say, if he should be sued by the servant, he will generally be enabled to rely upon the defence of privilege (*h*), *i.e.*, that the occasion on which the statement complained of was made was a privileged one. If this defence is raised and proved the servant must then, in order to succeed in the action, show that the master has been guilty of express malice (*i*).

It will be convenient to treat of these matters in order, and first of all, therefore, to consider, with special reference to servants, the nature of the circumstances which will give rise to an action of defamation.

Any defamatory statement concerning an individual, if published to another by means of writing, or some other more or less permanent method, is *prima facie* a libel, and is actionable without more, as being a wrong in regard to which the law presumes that some damage has been caused to the plaintiff in the ordinary course of things.

If such a statement is published by word of mouth, it will only be

(*d*) *Wilkin v. Reed*, 15 C. B. 192.

(*e*) Under the Servants' Characters Act, 1792 (32 Geo. III. c. 56). See Chitty's Statutes, title, "Master and Servant."

(*f*) *Le Lievre v. Gould*, [1893] 1 Q. B. 491.

(*g*) If the expressions used are capable of a harmless and also of a defamatory meaning, an innuendo or statement of the defamatory meaning relied on should be set out in the statement of claim. It is for the Court to determine whether the words used are capable of the meaning alleged in the innuendo; it is for the jury to determine whether that meaning was properly attached to them: *Australian Newspaper Co. v. Bennett*, [1894] A. C. 284.

(*h*) *Post*, p. 286.

(*i*) *Post*, p. 299

actionable, as a slander, upon the allegation and proof of special damage, except in the four cases presently referred to, in which damage of some kind is presumed by the law, as in the case of libel, so that special damage is not necessary to support the plaintiff's case.

By special damage is meant some actual temporal loss, which must be alleged and proved with such certainty and precision as the nature and circumstances of the case allow (*k*). The damage alleged must be the natural and probable consequence of the words complained of (*l*), and it is a question of law whether the damage alleged flowed from the words spoken (*m*).

The defendant said to the plaintiff's master, "You have a barman in your employ, named Speake, who has removed from his landlord's house leaving £2 owing for a month's rent, and I cannot get the money from him." The special damage alleged was the plaintiff's dismissal from his master's service. The Court of Appeal held that the plaintiff's dismissal was not a consequence which could reasonably be anticipated as following upon the words spoken, and that there was therefore no special damage upon which the action could be maintained (*n*).

The cases in which it is not necessary for the plaintiff in an action for oral defamation to prove special damage are, (1) where the words spoken impute to the plaintiff a contagious disease; (2) where they impute an offence punishable by imprisonment; (3) where they were spoken of the plaintiff in the way of his office, profession, trade or vocation, or disparage him in an office of public trust; and (4) words imputing unchastity or adultery to a woman or girl (*n*).

Of these four cases, the third is the only one which will here be discussed as having especial reference to the subject-matter of this book.

From this it will be seen that an action for slander may be maintained by a servant without proof of special damage, where the imputation affects him in his situation of servant, that is, where it is made with reference to his character or conduct as such, and imputes to him the want of some qualification for or misconduct in his situation.

Thus, in *Seaman v. Bigg* (*o*), in the time of Charles I., it was held that the words, "Thou art a cozening knave, and hast cozened thy master of a bushel of barley," spoken of a bailiff and servant in husbandry, were actionable: for, said the Court, though "true it is generally an action will not lie for calling one 'cozening knave,' yet where the

(*k*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

(*l*) *Lynch v. Knight*, 9 H. L. C. 577; *Bowen v. Hall*, 6 Q. B. D. 333.

(*m*) *Speake v. Hughes*, [1904] 1 K. B. 138. As to how far the utterer of a slander is liable for its repetition, see *Riding v. Smith*, 1 Ex. D. 91; *Speight v. Gosnay*, 60 L. J. Q. B. 231; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

(*n*) Slander of Women Act, 1891 (54 & 55 Vict. c. 51).

(*o*) Cro. Car. 480; and see *Reignald's Case*, Cro. Car. 563, where similar words were held actionable when spoken of a deputy clerk to a register, and *Wright v. Moorhouse*, Cro. Eliz. 358.

words are spoken of one who is a servant and accomptant, and whose credit and maintenance depends upon his faithful dealing, and he by such disgraceful words is deprived of his livelihood and means of maintenance, there is good reason it should bear an action, that he might have recompense for loss of his credit and means."

Upon this ground it has been held that to impute habitual drunkenness to a master mariner in command of a vessel at sea (*p*); or to say of a gamekeeper in a hunting country that he killed foxes (*q*); were actionable without special damage.

And to say of a servant girl "You are not aware, Mrs. C., what kind of a girl you have in your service, for I can assure you she is often out with our married man" (*r*); or to say of her that while she was in Mrs. B.'s employment as domestic servant she was debauched and had a miscarriage, and in consequence was dismissed by Mrs. B. for such misconduct (*s*), is actionable without proof of special damage.

But unless the imputation be connected with the servant's occupation, or show the want of some general requisite, no action can be maintained in respect of it. "Every authority which I have been able to find," said Bayley, B., in *Lumby v. Allday* (*t*), either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade or business." In that case, therefore, where the defendant said of the plaintiff, who was clerk to the Birmingham and Staffordshire Gas Light Company, "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores. I will have you in the *Argus*. You have bought up all the copies of the *Argus*, knowing you have been exposed. You may drown yourself, for you are not fit to live, and are a disgrace to the situation you hold," Bayley, B., intimated a strong opinion that the charge proved was not actionable; because the imputation it contained did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his conduct as clerk (*u*).

The next thing to be borne in mind is that it is not the mere writing of a libel or the mere uttering of slanderous words that is actionable. It is the publication that is actionable, that is to say, the communication of the defamatory matter to some person other than the person who is

(*p*) *Irwin v. Brandwood*, 2 H. & C. 960. See also *Hamon v. Falle*, 4 App. Cas. 247.

(*q*) *Foulger v. Newcomb*, L. R. 2 Ex. 327.

(*r*) *Rumsey v. Webb*, 11 L. J. C. P. 129.

(*s*) *Connors v. Justice*, 13 Ir. C. L. R. 451. See now also the Slander of Women Act, 1891 (54 & 55 Vict. c. 51).

(*t*) 1 Cr. & J. 301, 305; cited with approval by Lord Herschell in *Alexander v. Jenkins*, [1892] 1 Q. B. 797. See also *Jones v. Jones*, [1916] 2 A. C. 481.

(*u*) See *Ayre v. Craven*, 2 A. & E. 2; *Southee v. Denny*, 1 Ex. 196; *Hopwood v. Thorn*, 8 C. B. 293; *Miller v. David*, L. R. 9 C. P. 118, where it was held not to be actionable to say of a stonemason that he was ringleader of the nine-hours' system, &c. In *James v. Brock*, 9 Q. B. 7, the words complained of were that the plaintiff had "been guilty of conduct unfit for publication." This was held not actionable unless shown to have been spoken with reference to the plaintiff's office.

defamed. For this purpose it has been held (x) that husband and wife are one person, so that the communication of a libel on a domestic servant made by a husband to his wife is not evidence of its publication. If a writing is sent straight to the person of whom it is written, there is no publication of it. And if the writer of a letter locks it up in his desk, and a thief breaks open the desk and takes the letter away and makes its contents known, there would probably be no publication by the writer. But if the writer gives the letter to his clerk to copy for him, or if he directs it to the person of whom it is written and sends it by post in such a way that it may probably be opened and read by that person's clerk, and it is so opened and read, this would be a publication by the writer (y).

Where by a *bonâ fide* mistake a letter containing defamatory words concerning a servant was addressed to the master, instead of the servant at the master's house, it was held (z) that there was publication; and a libel may be published by writing it on the back of a postcard, addressed to the person defamed, or by means of a telegram to him (a).

It has been already stated as a general rule that anything said or written by a master in giving a character to a discharged servant, if said or written without express malice, is a privileged communication, so that the master will not be liable to the servant in respect of it.

Lindley, L.J., in a considered judgment (b) has thus explained the meaning of the term privileged communication:—"A privileged communication is one made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language. This is the effect, in a few words, of the leading cases on the subject,—namely, *Toogood v. Spyring* (c); *Wright v. Woodgate* (d); *Coxhead v. Richards* (e); *Whiteley v. Adams* (f); and *Clark v. Molyneux* " (g).

The question there arises, what is the meaning of a "privileged occasion" (h).

(x) *Wennhak v. Morgan*, 20 Q. B. D. 635.

(y) *Pullman v. Hill & Co.*, [1891] 1 Q. B. 524. But such a publication to a clerk may be privileged; as where a solicitor, writing on behalf of a client on a privileged occasion, gives the letter to his clerk to copy in the ordinary course of a solicitor's business: *Bozsius v. Goblet Frères*, [1894] 1 Q. B. 842.

(z) *Fox v. Broderick*, 14 Ir. C. L. R. 453.

(a) *Sadgrove v. Hole*, [1901] 2 K. B. 1; *Williamson v. Freer*, L. R. 9 C. P. 393; compare *Edmondson v. Birch & Co., Ltd.*, and *Horner*, [1907] 1 K. B. 371.

(b) *Stuart v. Bell*, [1891] 2 Q. B. 341.

(c) 1 C. M. & R. 181.

(d) 2 C. M. & R. 573.

(e) 2 C. B. 569.

(f) 15 C. B. (N. S.) 392, 418.

(g) 3 Q. B. D. 237, 246. See also *Adam v. Ward*, [1917] A. C. 309.

(h) The privilege which may be a defence in an action of libel or slander may either be absolute or qualified. In the one case, i.e., if the statement complained

It may be first observed that in the trial of every action in which the defendant pleads privilege, the question whether the occasion on which the defamatory statement was published is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury; but when the jury have found the facts it is for the judge to say whether they constitute a privileged occasion (*i*).

The reason for holding any occasion privileged is "common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged and separate them from those which are not" (*k*).

But certain limits have been laid down which show that a communication will not be privileged unless it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned" (*l*). Moreover, the privilege does not extend to a communication upon extraneous matter made at the same time, which is not relevant to the discharge of the duty or the safeguarding of the interest (*m*).

It is not necessary here to follow out the application of the rule thus laid down to all the cases to which it has been applied. It will be sufficient to lay before the reader those cases which bear more immediately upon the subject-matter of this book, to which it has been held applicable. And in doing so, it will be convenient to consider—

- I. Communications made in discharge of some duty; and
- II. Communications made by a person in the conduct of his own affairs, in matters where his interest is concerned.

I. Communications made in discharge of some duty.

The duty here referred to need not be a legal duty. It is enough if there be some sort of duty of imperfect obligation,

of was published upon an occasion which is absolutely privileged, no action will lie, even though the person publishing the statement was actuated by express malice. This absolute privilege which attaches to statements made in Parliament, or in the ordinary course of judicial proceedings or in matters of State, or in certain other cases, is rather outside the scope of this book. The qualified privilege which concerns persons standing merely in the relation of master and servant, and which may be lost or destroyed by express malice, is the one which is hereafter mainly referred to.

(*i*) *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54; *Adam v. Ward*, [1917] A. C. 309.

(*k*) *Stuart v. Bell*, [1891] 2 Q. B. 341, per Lindley, L.J., at p. 346.

(*l*) Per Parke, B., in *Toogood v. Spyring*, 1 C. M. & R. 181. The passage from which these words are taken, says Lindley, L.J., in *Stuart v. Bell*, has been frequently quoted and always with approval; see also per Lord Dunedin in *Adam v. Ward*, [1917] A. C. 309. In *Whiteley v. Adams*, 33 L. J. C. P. 89, Erle, C.J., said that judges have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification; but all are clear that it is a question for the judge to decide.

(*m*) *Adam v. Ward*, [1917] A. C. 309

whether social or moral. But some such duty must in fact exist; it will not be enough in order to make an occasion privileged that the person whose statements are complained of believed a duty to exist, or acted under a sense of duty. This, though important on the question of malice, is not relevant to the question whether the occasion was or was not privileged (*n*).

It is clearly settled that a master is under a duty of this sort, whether it be called a moral duty or a duty to society, to give a character to a discharged servant. The privilege which he has in this matter is not allowed only for the benefit of the giver. "It is of importance to the public that characters should be readily given. The servant who applies for the character, and the person who is to take him, are equally benefited. Indeed, there is no class to whom it is of so much importance that characters should be freely given as honest servants. It is for that object that the communications are protected" (*o*).

In all cases of qualified privilege precisely the same considerations apply, and there is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral or social. In such a case *bonâ fides* is always presumed (*p*).

Usually communications by a person with respect to the character of a discharged servant are made in answer to some one's inquiries about it, but it is not necessary, in order to make the occasion privileged, that inquiries should first be made. A master may (when he thinks that another is about to take into his service one whom he knows ought not to be taken) set himself in motion and do some act to induce that other to seek information from and put questions to him (*q*).

And if, after giving a character, new facts should come to the late master's knowledge which lead him to alter the opinion which he had previously given as to the servant's character, the occasion of his giving his new opinion would also be privileged.

In *Gardner v. Slade* (*r*) the facts were as follows:—The plaintiff

(*n*) *Stuart v. Bell*, [1891] 2 Q. B. 341; *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54. The latter case also shows that the person to whom the communication is made must also have an interest or duty in the subject-matter of the communication.

(*o*) *Gardner v. Slade*, 13 Q. B. 801, per Wightman, J. But they are not privileged from production under an order for discovery: *Webb v. East*, 5 Ex. D. 108.

(*p*) *Jenoure v. Delmege*, [1891] A. C. 73; and see Lord Denman, C.J., in *Fountain v. Boodle*, 3 Q. B. 5.

(*q*) *Pattison v. Jones*, 8 B. & C. 578, per Bayley, J.; *Waller v. Loch*, 7 Q. B. D. 619.

(*r*) *Gardner v. Slade*, 13 Q. B. 796. See *Owens v. Roberts*, 6 Ir. C. L. Rep. 386, where Monahan, C.J., said: "We are of opinion that if a person, having an interest in obtaining information as to the affairs of another person, makes a *bonâ fide* application to a third person for that purpose, and the latter in reply to such inquiry gives the information required, such a communication is privileged: for the fact of such an inquiry having been made, not officially but *bonâ fide* and by a person interested, imposed upon the person of whom the inquiry is made an obligation either not to speak at all upon the subject, or if he does so, to speak the truth. And we are of

had been cook in the defendant's family, and left. M. applied for her character at a time when Mrs. Slade was ill. Mr. S. answered the application, and gave the plaintiff a good character, whereupon M. hired her. Mrs. S. recovered, and having occasion to write to M. about another cook, asked about her dealings with respect to meat, &c., in the kitchen, and ended, "I mention this particularly, having discovered that I have been much imposed upon in this way a short time ago." M. called on Mrs. S., and she in conversation spoke the words complained of, which were to the effect that she suspected that the conduct of the plaintiff, when in her service, was not honest. After action brought she wrote to M. saying: "You will remember that I imputed no dishonesty; for of that I have no knowledge." The jury found that the defendant by her letter intended to induce inquiries on B.'s part as to the plaintiff, and found a verdict for the plaintiff. But the Court afterwards ordered a nonsuit to be entered, on the ground that the communication was privileged, and there was no evidence of malice. And Lord Denman said: "I think the privilege which protects a master in giving a character lasts as long as anything is discovered before unknown to the master; as for instance, if I give a good character to a servant, and next day discover that the servant is dishonest; surely, in such a case it becomes my duty to communicate my discovery to the person to whom I have given the character."

And Coleridge, J., added, "Nobody can doubt that."

The plaintiff (s) was secretary of the Brewers' Insurance Company, and being charged with misconduct was called upon to attend a board of directors to explain, but declined to do so; whereupon the directors, after hearing the nature of the charges, passed a resolution declaring him to have been guilty of gross misconduct and dismissing him. The defendant, who was a director of that company and also of another company called the London Necropolis Company, communicated the facts of the plaintiff's dismissal from the service of the former company "for gross misconduct," at a board meeting of the latter company, and proposed a resolution to dismiss him from his employment as their auditor, and in answer to an inquiry from the chairman, said the misconduct consisted in "obtaining money from the solicitors of the company under false pretences and paying a debt of his own with it"; and upon the plaintiff's appearing on a subsequent day with his attorney before the board to meet the charges against him, the defendant refused to go into them. It was held that such refusal was no evidence of

opinion upon all the authorities, that in the case of a person making an inquiry of another who is the acquaintance of the third person as to whom the inquiry is made, and from his position likely to be acquainted with the affairs of the latter, and where the party making the inquiry is or is about to become a creditor of such third person, that such a communication is privileged." See also *Child v. Affleck*, 9 B. & C. 403.

(s) *Harris v. Thompson*, 13 C. B. 333.

malice; as being consistent with *bonâ fides*, *bonâ fides* must be presumed until the contrary was proved.

A letter addressed to a person on whose recommendation the writer had taken the plaintiff into his service, to the effect that his conduct had not justified the character given of him, that he had left a balance unaccounted for, and that he ought not to be recommended for morality or honesty, has been held to be a privileged communication (*t*).

In *Stuart v. Bell* (*u*) the plaintiff was a valet, and while he and his master were staying at the house of the defendant, the Mayor of Newcastle, the chief constable of Newcastle showed the defendant a letter he had received from the Edinburgh police stating that the plaintiff was suspected of having committed a theft at a hotel in Edinburgh, and suggesting a cautious inquiry. The defendant did not make any inquiry, but told the plaintiff's master privately that there had been a theft in an Edinburgh hotel and that suspicion had fallen upon the plaintiff. Some days after, the plaintiff's master dismissed him upon the ground that he had been suspected of dishonesty. The majority of the Court of Appeal held that the occasion of the communication was privileged, and that, in the absence of evidence of malice, the defendant was not liable.

And if a friend of the servant gets the servant's master to write him a letter repeating a bad character that had been given of the servant, this will be privileged. Thus, in *Weatherston v. Hawkins* (*x*) the plaintiff brought an action against his former master for publishing the following letter to C., the plaintiff's brother-in-law, respecting the plaintiff's character as a servant. "Two days I gave him money to go into the city and buy books. When he came home I desired him to reckon up his account; he did so. But being one day more curious than I sometimes was, I looked over his account, article by article; and in one, a book I well knew the price of, I found he had charged me one shilling more than it cost, and that shilling he kept in his pocket. The next day the very same affair. And both these days my neighbour Metcalf was in my shop, and knows it well, and said he would not keep such a man a day, or something to that purpose. Two magazines he charged 2s. for binding, the people received no more than 1s. 8d., and say he paid no more. This I can prove." It appeared that the plaintiff had been in the service of the defendant, and was by him turned away. Rogers, to whom the

(*t*) *Dixon v. Parsons*, 1 F. & F. 24. A similar question arose in *Fryer v. Kinnersley*, 15 C. B. (N. S.) 422, but the Court held that whatever might have been their opinion as to the privilege on the ground that the person to whom the letter was addressed had recommended the plaintiff to the defendant, and was in the habit of recommending gardeners for masters and masters for gardeners, yet the letter was "so much in excess of the occasion" as to be excluded from privilege. Upon this case being cited in *Cowles v. Potts*, 34 L. J. Q. B. 248, Blackburn, J., said: "I do not quite understand the *ratio decidendi*."

(*u*) [1891] 2 Q. B. 341.

(*x*) 1 T. R. 110.

plaintiff was recommended as a servant, applied to the defendant for a character, which not being good, Rogers declined to take him. Upon this C. called repeatedly on the defendant, upon which the above letter was written, in order to prevent an action for the words spoken to Rogers by the defendant. But the present action was brought. It was, however, held by Lord Mansfield, C.J., and other judges, that it would not lie, as instead of the plaintiff's showing the libel complained of to be false and malicious, it appeared to be incident to the application by Rogers to the master of the servant. And the letter was written to the brother-in-law of the plaintiff for the express purpose of preventing an action being brought (y).

And so in *Taylor v. Hawkins* (z), it appeared that the plaintiff was a shopman of the defendant, and that the defendant, having a suspicion that he had embezzled money in the course of his employment, sent for the plaintiff, and, in the presence of a friend, Mr. T., uttered the words complained of in the first count, which were: "You have robbed me of 5s.: you have altered the cheque: and you had not an opportunity to alter the book, or you would have done it," and immediately afterwards discharged him. After his discharge, the plaintiff being about to enter the service of B., the defendant was referred to for a character, but, in consequence of what the defendant then stated to him, B. declined to take the plaintiff into his employment. Upon this the plaintiff's brother called upon the defendant to inquire why he had given the plaintiff such a character as kept him from obtaining a situation; upon which the defendant said: "What would you do if your men were to rob you?" to which the plaintiff's brother replied, "I trust such is not the case with William." The defendant then said: "He has robbed me; and I believe for years past." This last answer was what was complained of by the second count of the declaration. It was held that the occasion on which these communications were made was such as to render them privileged, and that the presence of a third party when they were made did not alone render them not so.

Communications made by a tenant to his landlord respecting the character of a servant about to be hired by the latter have also been held to be privileged (a). Thus, where (b) the father of the plaintiff

(y) In *King v. Waring*, 5 Esp. 13, Lord Alvanley refused to allow a letter to be given in evidence, which had been procured by the plaintiff from the defendant by means of another letter, not written with a fair view of inquiring a character, but to procure an answer upon which to ground an action for a libel; and see *Rogers v. Clifton*, 3 B. & P. 592.

(z) 16 Q. B. 308; and see *Harris v. Thompson*, 13 C. B. 333.

(a) As to how far a communication by a landlord to his tenant reflecting on the character of the tenant's servants is privileged, see *Knight v. Gibbs*, 1 A. & E. 43.

(b) *Cockayne v. Hodgkisson*, 5 C. & P. 543. The question of privilege appears not to have been raised in *Baylis v. Lawrence*, 11 A. & E. 920, in which case the libel complained of was contained in a letter written by defendant to plaintiff's landlord, complaining of his conduct about game.

had been for some years gamekeeper to the Marquis of Anglesey, and the plaintiff wished to become his lordship's gamekeeper and overlooker of fences for a farm of which the defendant, an old man, was tenant; and the defendant sent a letter to the Marquis, informing him, amongst other things, that the plaintiff encouraged poachers, and sold game, Mr. Justice Parke left it to the jury to say whether it was the duty of the defendant to make communications to the Marquis in respect of any neglect of duty in his gamekeepers; and said that: "If he was desired to do so by the noble Marquis, or his agents, any communication he made would be privileged, if he wrote it *bonâ fide*, and considering that he was doing his duty to the Marquis as his landlord. If it was the duty of the defendant to make the communication, the case falls within the principle of many other cases. To write of another that he is a thief is a libel; but if one gentleman asks another gentleman respecting a servant's character, and he writes that the servant was a thief, he is protected if he acts *bonâ fide*."

His lordship also left the case to the jury on the question of malice, and they found for the defendant.

In *Coxhead v. Richards* (c), the facts were shortly these:—The plaintiff was a mariner, and had the command of a ship belonging to W., of which ship Cass, an intimate friend of the defendant, was mate. Cass wrote to the defendant reflecting in strong terms upon the plaintiff's conduct on a particular voyage, but requesting the defendant not to show the letter to W. On receipt of the letter, however, the defendant showed it to a naval friend, one of the Elder Brethren of the Trinity House, and also to Soames, an extensive shipowner, and in accordance with their advice, communicated it to W., who immediately superseded the plaintiff in his command, and ceased to employ him. The plaintiff upon this brought an action for libel against the defendant: and the defendant pleaded a justification, but failed to sustain it. And it did not appear that W. had instituted any inquiry into the charges contained in Cass's letter. On the part of the defendant it was contended that the action would not lie, on the ground that the communication of the letter to W. was privileged. And Tindal, C.J., told the jury that the occasion and circumstances under which that communication took place furnished a legal excuse for making it; that the plaintiff, to entitle himself to a verdict, must show malice in fact, and the jury must find for the defendant if they thought the communication strictly honest on his part, and made solely in the execution of what he believed to be a duty; but for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from malice against the plaintiff. The jury found for the defendant. And in the following term a rule *nisi* was obtained by the plaintiff

for a new trial on the ground of misdirection. The rule was twice argued in consequence of a difference of opinion amongst the judges; and ultimately, the four judges before whom the case was argued differed; Tindal, C.J., and Erle, J. (*d*), holding that the communication was privileged, as the defendant *bonâ fide* believed, and had reason to believe, the statement to be true, and that it was his duty to communicate it to the plaintiff's master; and Coltman and Cresswell, J.J., holding that it was not privileged, as there was no duty which obliged the defendant to make the communication without ascertaining its truth.

In a case (*e*) in America, in which a railroad corporation was held liable, in its corporate capacity, for a libel published by its agents in the course of its business and of their employment, it was held to be within the course of its business and the employment of the president and directors for them to investigate the conduct of their officers and agents, and report the result to the stock-holders. It was also held, that in the absence of malice or bad faith, a report to the shareholders was privileged, but that such privilege did not extend to the preservation of the report and evidence in a book for distribution amongst the persons belonging to the corporation. And the corporation was held liable in damages for publishing it in that form.

Upon the above-cited American authority being cited from a previous edition of this work in a subsequent case (*f*), in England, Mellor, J., and Hannen, J., expressed their approval of it. The facts were as follows:—The defendants were a company established for the purpose of growing cotton in Egypt. The plaintiff was their manager there, and it was his duty to furnish defendants with an account of his transactions to enable them to give the shareholders an account of the profits of the undertaking. The auditors were of opinion, and reported, that a depreciation in the stock of the company was owing to the mismanagement of the plaintiff. They came to this opinion, after explanations had been offered to them by one B., but these explanations were offered to them only, and not to the directors. At the ordinary general meeting of shareholders, the directors laid before them a statement of the accounts, and in this statement repeated what had been reported to them by the auditors. There was nothing whatever to show that they had any reason to doubt the truth of this report, nor was there in what happened at the meeting

(*d*) And it is said that the opinion of Erskine, J., who retired from the bench between the first and second argument of the case, was understood to be in favour of the defendant. See the note of the reporters, 2 C. B. 583; and see acc. *Davis v. Reves*, 5 Ir. C. L. Rép. 79. In *Amann v. Damm*, 29 L. J. C. P. 314, Willes, J., expressed his concurrence in the opinion of Tindal, C.J., and Erle, J. So also did Lindley, L.J., in *Stuart v. Bell*, [1891] 2 Q. B. 341, 347.

(*e*) *Philadelphia, Wilmington and Baltimore Railroad Corporation v. Quigley*, 21 How. (Amer.) Rep. 202.

(*f*) *Lawless v. Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262.

any extrinsic evidence of malice on their part. By a resolution passed at the meeting the report of the directors with the accounts, and the report of the auditors, were ordered to be printed, and sent to the shareholders at large; and they were accordingly sent to a printer, printed, and circulated among the shareholders, and used by them at an adjourned meeting. An action for libel was brought against the company and tried before Kelly, C.B., who ruled that it was not a privileged communication, and the plaintiff having proved special damage, recovered a verdict for £500. But the Court of Queen's Bench afterwards set aside the verdict, and ordered a nonsuit to be entered on the ground that it was a privileged communication, and that the sending it to the printer merely to be printed did not destroy the privilege, as that was a reasonably necessary mode of making a communication which the directors were bound to make to their shareholders, absent as well as present; they were not bound to employ confidential clerks to write a letter to each shareholder.

In the following case (*g*), also, the slander complained of was held to be a privileged communication. The plaintiff was trustee of a charity, and also farm bailiff to Mr. Cooper. Attempts had been made to remove the plaintiff from the trust, and being unwilling to resign, he requested Cooper to obtain signatures to a protest against his being turned out. Cooper applied to the defendant to sign the protest: he refused, and upon Cooper asking his reasons for refusing, said he would not keep a big rogue like the plaintiff in the trust. Cooper further pressed the defendant for his reason for his opinion, and he then said that the plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including the defendant. Cooper further stated that in consequence of what the defendant told him he dismissed the plaintiff. The plaintiff brought an action, and the jury found a verdict for him, but they also found that the defendant had not acted with malice. The Court of Queen's Bench afterwards ordered the verdict to be entered for the defendant, on the ground that the communication was privileged, having been *bonâ fide* spoken with reference to the discussion whether it was proper to retain the plaintiff as a trustee of the charity, and Blackburn, J., having stated that the law laid down in *Toogood v. Spyring* (*h*) had always been approved of, added: "In the more recent decisions, such as *Whiteley v. Adams* (*i*), the tendency has been to extend the limits of the moral duty or reasonable exigency which authorises the publication of defamatory matter. But we think that the present case falls strictly within the limits as laid down in *Toogood v. Spyring*."

In *Johnson v. Evans* (*k*) the words complained of were: "She is a

(*g*) *Cowles v. Potts*, 34 L. J. Q. B. 247. (*h*) 1 C. M. & R. 181, *post*, p. 301.

(*i*) 15 C. B. (N. S.) 392.

(*k*) 3 Esp. 32; but see *Smith v. Hodgeskins*, Cro. Car. 276.

thief, and tried to rob me of part of her wages." The plaintiff had been servant to the defendant. Upon a dispute taking place he discharged her, and some difference arising respecting the payment of her wages, he charged her with having attempted to cheat him respecting her wages, and used the words as laid, but the plaintiff failed in proving them to have been spoken at that time. Having, however, sent for a constable in order to take her into custody, he used the same words to the constable when he came, to whom he meant to have given her in charge, but which in fact he did not do. It appeared from the evidence of the constable, that the words were addressed to him in his character of constable, and in the course of the charge and complaint which the defendant made to him against the plaintiff. Lord Eldon, C.J., nonsuited the plaintiff, saying that: "Words used in the course of legal or judicial proceeding, however hard they might bear on the party of whom they were used, were not such as would support an action for slander. In this case they were spoken by the defendant under a belief of the fact, and when he was about to proceed legally to punish it. It would be a matter of public inconvenience, and operate to deter persons from preferring their complaints against offenders, if words spoken in the course of their giving charge of them, or preferring their complaint, should be deemed actionable."

To this class may also be referred the cases of *Murphy v. Kellett* (l), in which an opinion expressed by the medical officer of a union to the guardians, as to the wine of the plaintiff, who had made a tender to supply the patients, was held to be privileged: *M'Elveney v. Connellan* (m), in which a report made by the Inspector-general of Prisons in Ireland to the Lord Lieutenant of Ireland, under 7 Geo. IV. c. 74, s. 59, was held to be a state document and privileged; and *Cox v. Feeney* (n), in which the publication in a newspaper of a report of an inspector of charities under the Charitable Trusts Act, containing a letter written some years before by the dean to the bishop, who was visitor of a college, reflecting on the conduct of the plaintiff, who was one of the professors of the college, was also held to be privileged.

In *Pittard v. Oliver* (o), the plaintiff had been clerk to a board of guardians, and, a dispute having arisen between him and them as to the state of his accounts, he resigned, but made a claim against them for a certain sum which he said was due to him. The defendant, a member of the board, at a meeting of the board at which the plaintiff's claim was discussed, uttered the words for which he was sued by the plaintiff. The judge at the trial ruled that the occasion was privileged. The Court of Appeal held that this privilege was not taken away by the presence of reporters at the meeting when the words were uttered.

(l) 13 Ir. C. L. R. 488.
(n) 4 F. & F. 13.

(m) 17 Ir. C. L. R. 55.
(o) [1891] 1 Q. B. 474.

II. Communications made by a person in the conduct of his own affairs where his interest is concerned.

In cases of this sort, in order that the occasion may be privileged, it is necessary that the person to whom the communication is made, as well as the person making it, should have in fact an interest or duty in respect of the subject-matter of the communication (*p*).

There is a reciprocity of interest of this kind between a railway company and its servants with regard to things done by their other servants which the company intend to treat as misconduct entailing dismissal; and on this ground, where a company, in a printed circular addressed to their servants, published the name of the plaintiff stating that he had been dismissed, and the nature of the offence for which he was dismissed, the occasion was held to be privileged (*q*).

In another (*r*) case the defendant had dismissed the plaintiff from his service on a charge of theft, and plaintiff, on coming two days later to receive wages which were due to him, had some communication with the defendant's servants; whereupon the defendant said to them: "I have dismissed that man for robbing me. Do not speak to him any more in public or in private, or I shall think you as bad as him." This was ruled by Lord Truro to be a privileged occasion, and, in the absence of evidence of express malice, he said there was no case to go to the jury. His ruling was afterwards upheld by the Court of Common Pleas.

In a subsequent case (*s*) the defendant, returning home late at night, heard that the footman had been giving away provisions which he had obtained from the cook, and thereupon he dismissed them both. Subsequently, in answer to inquiries, he told the cook that he had dismissed her because she and the footman had been robbing him. He also told the footman that he had discharged him because he and the cook had been robbing him. Each brought an action, but both were nonsuited, there being no evidence of malice.

Upon these principles of common interest, letters in the following cases have been held to be privileged: a letter from a servant to his master reflecting upon the character of a third person who had either complained, or threatened to complain, to the master about the servant (*t*); a letter written by a discharged butcher to his customer, reflecting on the honesty of the customer's housekeeper (*u*); a letter written by one part owner of a brig to another part owner who had recommended the plaintiff as master, reflecting upon the master's conduct (*x*).

(*p*) *Harrison v. Bush*, 5 E. & B. 344; *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54.

(*q*) *Hunt v. Great Northern Railway Co.*, [1891] 2 Q. B. 189.

(*r*) *Somerville v. Hawkins*, 10 C. B. 583.

(*s*) *Manby v. Witt*, 18 C. B. 544.

(*t*) *Wright v. Woodgate*, 2 Cr. M. & R. 573.

(*u*) *Coward v. Wellington*, 7 C. & P. 531; see also *Amann v. Damm*, 29 L. J. C. P. 313.

(*x*) *Wilson v. Robinson*, 7 Q. B. 68.

But words spoken by one subscriber to a charity, in answer to inquiries by another subscriber respecting the conduct of a medical officer of the charity, have been held not to be privileged; and in an action for slander the plaintiff recovered a verdict and damages (y). In that case, however, there did not appear to be a sufficient reason for the conversation between the parties to constitute a privileged communication. And in a subsequent case Lord Wensleydale said that if those observations had been made in a matter of contest, and the contest was whether the person slandered should be elected, it appeared to him that it would have been a privileged communication. The case alluded to is *Kine v. Sewell* (z), in which the defendant, having been requested by A. to recommend a person to value some work done for him by the plaintiff's master under contract, told A. that the plaintiff had stolen some of the materials, and afterwards repeated the charge to the plaintiff's master; but it was held that the defendant was not liable to an action without proof of express malice on his part; for although the charge appeared to be untrue, yet the communication having been made *bonâ fide* to a person interested in discovering a wrongdoer, and who made inquiries, and believed to be true by the defendant, was privileged.

Where a person having ground or supposed ground of complaint against a servant or public officer, makes a representation of his conduct to his master or superior officer with a view to obtaining redress, the communication has been held to be privileged on the ground of interest in the party making it, if *bonâ fide* and honestly made, although the person addressed has not in reality the supposed power.

In *Lake v. King* (a) a petition presented to a committee of the House of Commons, containing criminatory matter, was held privileged, the committee having power to inquire, although no power to give redress to the petitioner. So where a person (b), having a just claim against an officer in the army, and who therefore in some measure was subject to the control of the Secretary at War, applied by petition to the latter, in order to obtain through his interference the payment of his debt; it was held that the petition having been published for the purpose of obtaining redress and not for the purpose of slander, could not be made the subject of an action. And Best, J., cited *The King v. Bayley* (c), in which a letter addressed to General Willes and the four principal officers of the Guards, to be by them presented to the King, stating that the prosecutor had obtained from the defendant a

(y) *Martin v. Strong*, 5 A. & E. 535; see *Cowles v. Potts*, 34 L. J. Q. B. 247, ante, p. 294.

(z) 3 M. & W. 297; see *Kershaw v. Bailey*, 1 Ex. 743.

(a) 1 Wms. Saund. 131 b; and see *Dunne v. Anderson*, 3 Bing. 88.

(b) *Fairman v. Ives*, 5 B. & Ald. 642; and see *Wenman v. Ash*, 13 C. B. 837. The report of *Fairman v. Ives* seems to be not quite accurate: per Lord Esher, M.R., in *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54, 61.

(c) Bac. Abr. Libel, A. 2.

warrant for the payment of money due to him from government, under a promise of paying the defendant such money, and that the prosecutor had received the money, and had not paid it over to the defendant, was held to be no libel, but a representation of any injury drawn up in a proper way for redress, and added: "That case is like the present. Neither the officers nor the King could give the defendant direct assistance in receiving the money wrongfully withheld. But the King had authority to dismiss an officer from his service, and most probably would dismiss any one who hesitated to do what honour and justice required. In the present case there was at least probable cause for thinking that the Secretary at War would advise His Majesty that the plaintiff was not worthy to remain in the Army unless he did the defendant immediate justice."

So in an action (*d*) for libel upon the plaintiff, in his situation of guard of the Exeter mail, by reason of which he was dismissed from his situation. The libel complained of was a letter written to Sir Francis Freeling, chief secretary to Her Majesty's Postmaster-General, by the defendant, who was unconnected with the post-office, complaining of some misconduct of the plaintiff towards the defendant's wife in a journey by the mail. It was held by Taunton, J., that the letter was clearly not absolutely privileged, on the ground of its being an official communication (*e*). But that learned judge also expressed an opinion, that the occasion on which the letter was published rendered its publication excusable, in the absence of express malice.

A letter to the Privy Council referring to the conduct of an inspector removable by the Council has also been held to be privileged, though not absolutely (*f*).

And a memorial, transmitted to the Home Secretary, complaining of the conduct of the plaintiff, who was a county magistrate, during an election of an M.P. for a borough in the county, has been held to be privileged, although in practice the advice of the Keeper of the Great Seal is generally acted upon as to the removal of justices; as the memorial might be considered as addressed to the Queen through the Home Secretary, who might himself have caused an inquiry to be made, have communicated with the Keeper of the Great Seal, and have in effect recommended the removal of the plaintiff (*g*).

Though the statements complained of were made upon an occasion to which a qualified privilege attaches, yet, as previously mentioned,

(*d*) *Blake v. Pilfold*, 1 Mood. & Rob. 198.

(*e*) Within the cases of *Home v. Bentinck*, 2 B. & B. 130; *Wyatt v. Gore*, Holt, N. P. 299. See *Dawkins v. Paulet*, L. R. 5 Q. B. 94; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744; and *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189. See also *Woodward v. Lander*, 6 C. & P. 548.

(*f*) *Proctor v. Webster*, 16 Q. B. D. 112.

(*g*) *Harrison v. Bush*, 5 E. & B. 344, overruling to a certain extent *Blagg v. Sturt*, 10 Q. B. 899, in which case, however, there was express malice.

they will not come within the definition (*h*) of privileged communications so as to afford complete protection to the defendant, if in making them he was actuated by express malice, or, as it is also called, actual malice, or malice in fact.

The privilege of the occasion having rebutted the malice presumed by law to exist in the making of a defamatory statement, the burden of proving express malice lies on the plaintiff; and the question whether or not there was malice is one for the jury (*i*).

It is not, however, sufficient to entitle the plaintiff to have the question of malice left to the jury, that the facts proved should be merely consistent with the presence of malice, as well as with its absence; "for the existence of malice is consistent with the evidence in all cases, except those in which something inconsistent with malice is shown in evidence; so that to say that in all cases where the evidence was consistent with malice it ought to be left to the jury, would be, in effect, to say that the jury might find malice in any case in which it was not disproved, which would be inconsistent with the admitted rule that in cases of privileged communications malice must be proved, and, therefore, its absence presumed till such proof is given. It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence" (*k*).

The meaning with which the word "malice" is used in this connection has been explained in many ways. Lord Denman, C.J., has referred to it as being "an indirect motive" (*l*). In a more recent case (*m*), Brett, L.J., said it meant "a wrong feeling in a man's mind," while, in the same case, Cotton, L.J., said that it was "for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty." Lindley, L.J., spoke (*n*) of the word as being not confined to personal spite and ill-will, but including every unjustifiable intention to inflict injury on the person defamed. And again, Lord Esher, M.R., said (*o*), that the question of privilege depended on whether the defendant was using the privileged occasion honestly or abusing it, and proceeded: "If a

(*h*) Cited *ante*, p. 286, from *Stuart v. Bell*, [1891] 2 Q. B. 341.

(*i*) *Clark v. Molyneux*, 3 Q. B. D. 237; *Stuart v. Bell*, [1891] 2 Q. B. 341.

(*k*) Per Maule, J., in *Somerville v. Hawkins*, 10 C. B. 583; and see *Taylor v. Hawkins*, 16 Q. B. 308; *Harris v. Thompson*, 13 C. B. 333; *Spill v. Maule*, L. R. 4 Ex. 232; *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495.

(*l*) *Fountain v. Boodle*, 3 Q. B. 5, 13.

(*m*) *Clark v. Molyneux*, 3 Q. B. D. 237, 247.

(*n*) *Stuart v. Bell*, [1891] 2 Q. B. 341.

(*o*) *Royal Aquarium, Limited v. Parkinson*, [1892] 1 Q. B. 431.

person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion."

Such an abuse of the occasion as may be evidence of malice for the consideration of the jury may be shown in a variety of ways.

The language used may afford such evidence (*p*). The fact that the statement complained of was untrue is in itself no evidence of malice, for if it were true there would be no need for the defendant to plead that the occasion was privileged. If, however, the defendant has stated what he knows to be untrue, no one ever doubted (*q*) that he would be abusing the occasion. The language of a privileged communication is not to be scrutinised too strictly (*r*). Persons differ in their expressions, and strong or angry language is not necessarily malicious (*s*). Language used in excess of the occasion (*t*) or too violent for the occasion and circumstances to which it is applied (*u*), is evidence from which the jury may infer malice; but a finding by the jury that in making the statement complained of the defendant had exceeded the privileged occasion has no effect (*x*), for the law will not infer malice from such a finding.

And in a case (*y*) where Coltman, J., left it to the jury to say whether the words were spoken with the honest intent of giving a neighbour important information of what was going on in his family, or whether it was done in an idle, gossiping, and malicious spirit, and the jury found a verdict for the plaintiff, the Court afterwards refused to disturb their finding.

Though under some circumstances (*z*) a person may be justified in volunteering a communication to another, yet this may be done in such a way, as by officious interference, as to afford evidence of malice (*a*).

(*p*) *Wright v. Woodgate*, 2 Cr. M. & R. 573; *Adam v. Ward*, [1917] A. C. 309, per Lord Dunedin.

(*q*) *Royal Aquarium, Limited v. Parkinson*, [1892] 1 Q. B. 431, per Lord Esher, M.R., at p. 443.

(*r*) *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495; *Jenoure v. Delmege*, [1891] A. C. 73.

(*s*) *Shipley v. Todhunter*, 7 C. & P. 680.

(*t*) *Fryer v. Kinnersley*, 15 C. B. (N. S.) 422.

(*u*) *Spill v. Maule*, L. R. 4 Ex. 232.

(*z*) *Nevill v. Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156; affirmed [1897] A. C. 68. If any one on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, that third person would have a right of action against the person making the statement, and as between him and the defendant there would be no privileged occasion: *Ibid.*, per Lord Esher, M.R., at p. 170.

(*y*) *Rumsey v. Webb*, 11 L. J. C. P. 129.

(*z*) *Pattison v. Jones*, 8 B. & C. 578; *Waller v. Loch*, 7 Q. B. D. 619.

(*a*) *Rogers v. Clifton*, 3 B. & P. 587.

So, too, sending a message by postcard or telegram may, under some circumstances, be evidence of malice (b).

And the mere fact that a third person was present when defamatory words were spoken upon an occasion otherwise privileged will not, *ipso facto*, destroy the privilege, though if an opportunity of publishing the libel in the presence of a third person is sought out, that may be evidence of malice. Thus, where (c) it appeared that the plaintiff was a journeyman carpenter, and had been in the employ of B., a master carpenter, in the constant employ of the Earl of Devon at Powderham. The defendant was tenant to the Earl, and required some repairs at his farm, and plaintiff, pursuant to B.'s orders, went with another workman to the defendant's house for the purpose of doing them. The work was done in a negligent manner, and not to the satisfaction of B. During the progress of the work the plaintiff got drunk, and circumstances occurred which induced the defendant to believe that the plaintiff had broken open the cellar and obtained access to his cyder. B. had requested the defendant to inspect the work, and afterwards, whilst the plaintiff and one T. were at work at Powderham, the defendant came up, and in his presence, charged the plaintiff with breaking open the cellar, getting drunk, and spoiling his job. The plaintiff denied the charge, but defendant said he would swear it, and so would his men. In a subsequent conversation, in the plaintiff's absence, the defendant, in answer to a question by T., whether he really thought the plaintiff had broken open his cellar, said he was sure of it, and his people would swear to it. Defendant then went away in search of B., whom he saw, and to whom he repeated that the plaintiff had broken open the door, got drunk, and spoiled his job. B. thereupon went to the plaintiff, and told him that until his character was cleared he could not remain in the employ of the Earl. The next day B. investigated the charge, and told the plaintiff he considered it not made out, and his character was cleared, and he might go to work again; but the plaintiff refused to work, saying his character was not cleared, and brought his action against the defendant. It was held, that the communication to B. was privileged, and that the statement made to T. upon the second meeting in the plaintiff's absence was not, but that the statement made to the plaintiff, though in the presence of T., was privileged. And in delivering the judgment of the Court of Exchequer, Lord Wensleydale, after laying down in a passage that has been already referred to (d), the principles upon which a communication may be held privileged, said: "Among the many cases which have been reported

(b) *Williamson v. Freer*, L. R. 9 C. P. 393; *Sadgrove v. Hole*, [1901] 2 K. B. 1.

(c) *Toogood v. Spyring*, 1 Cr. M. & R. 181; and see *Padmore v. Lawrence*, 11 A. & E. 380; *Taylor v. Hawkins*, 16 Q. B. 308; *Jones v. Thomas*, 53 L. T. Rep. 678; *Pittard v. Oliver*, [1891] 1 Q. B. 474.

(d) *Ante*, p. 287.

on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication, that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed) (*e*), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and, if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communication is no doubt comprehended the right of a master *bonâ fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorised, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bonâ fide* in making the charge, or been influenced by malicious motives. In the present case the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorise him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment, and we think that the fact, that the imputation was made in T.'s presence, does not of itself render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury. We agree with the learned judge, that the statement to T. in the plaintiff's absence was unauthorised and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false."

Before quitting this part of our subject it will be convenient to refer to those cases arising out of remarks made by masters in writing upon their servants' written characters.

(*e*) *Child v. Affleck*, 9 B. & C. 403.

In 1835 an action of trespass (*f*) was brought by an ex-policeman against one of the commissioners of police for stamping the words "Dismissed the police service" upon a certificate of good character, which the plaintiff had brought with him on entering the police force. Lord Abinger, C.B., directed a verdict for the defendant on the ground that trespass was not the proper form of action, and also on other grounds; but he stated his opinion that if a servant enter into a service bringing a written character with him, and afterwards behaved ill, it could not be considered that the master did wrong if, when returning the character to the servant, he wrote upon it that the person to whose character it related had afterwards been in his service, and was dismissed for ill behaviour.

In an action (*g*) for libel and malicious damage to a document by writing defamatory words upon a servant's written character, Mathew, J., directed the jury to return a verdict of one shilling in respect of the damage to the document, but the Queen's Bench Division ordered a new trial on this point, saying the question of damage was one for the jury; Huddleston, B., pointing out the difference between letters ordinarily written in answer to an inquiry as to a servant's character—which would probably be the property of the master proposing to engage the servant—and a general testimonial of good character intended to be used as a voucher on future occasions.

Under the London Hackney Carriages Act, 1843 (6 & 7 *Vict. c.* 86), cases of a somewhat similar nature have arisen. By that Act drivers have to obtain licenses, and sect. 21 directs the proprietor of every hackney carriage to retain the license in his possession while the driver remains in his service. Sect. 8 also directs the proprietor to enter on the license the days on which the driver enters and quits his service. If the proprietor writes on the license anything more than he is authorised by the Act to write upon it, the cabdriver may maintain an action against him for defacing his license (*h*). A license may thus be defaced by the proprietor writing upon it one date only when the cabdriver entered his service and two dates for quitting it, and adding his signature, the effect of such an entry being to show other cab-proprietors that the driver had taken part in a cab strike. Such a defacement is a "matter of complaint" between a proprietor and a driver within sect. 22 of the Act, which a magistrate has jurisdiction to hear and determine, and in respect of which he may award such compensation as may seem proper (*i*).

(*f*) *Taylor v. Rowan*, 7 C. & P. 70. (*g*) *Wennhak v. Morgan*, 20 Q. B. D. 635.

(*h*) *Hurrell v. Ellis*, 2 C. B. 295; *Rogers v. Macnamara*, 14 C. B. 27.

(*i*) *Norris v. Birch*, [1895] 1 Q. B. 639.

CHAPTER VIII.

OFFENCES BY SERVANTS AGAINST THEIR MASTERS.

Burglary by a Servant in his Master's House.

A servant who lives in his master's house may be guilty of burglary in that house, as well as a stranger, for the opportunity which his situation affords him of committing that crime aggravates rather than extenuates his guilt (a). Where, therefore, one of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape, King, C.J., ruled it to be burglary, and the defendant was convicted and transported (b).

And where (c) a servant, in the night-time, opened the street door and let in a robber, and showed him the sideboard from whence he took the plate, and then again opened the door and let him out, it was held, at a meeting of all the judges, to be burglary in the servant as well as in the other, and he was afterwards executed. But where a servant opened the door and let in a robber for the purpose of catching him, having previously communicated with the police, it has been held that the robber even could not be convicted of burglary (d). That case, however, turned on the point that the prisoners went in by a door which was lawfully open. Where the prisoner suggested to the prosecutor's servant a plan for robbing the shop, and the servant, having informed his employer and the police, pretended to fall in with the plan and lent the keys of the shop to the prisoner who made duplicates, with one of which, on a day arranged with the servant, he unlocked a padlock and entered the shop, a conviction for breaking and entering the shop with intent to steal was upheld. Although the prosecutor was aware of the prisoner's intention, there was no assent to the breaking and entering, and the prisoner did not walk through an open door but broke the door open with a key (e).

(a) See 4 Bl. Com. 227; Bac. Abr. tit. Burglary. As to burglary in general, see 1 Russ. on Crimes, B. 4, ch. 1, and Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 25.

(b) *R. v. Gray*, 1 Str. 481.

(c) *Cornwall's Case*, 2 Str. 881; and see 19 St. Tr. 782, note; 1 Hale, P. C. 533; 2 East, P. C. 486.

(d) *R. v. Johnson*, Carr. & M. 218; see *R. v. Eggington*, 2 B. & P. 508.

(e) *R. v. Chandler*, [1913] 1 K. B. 125.

And in *R. v. Meeres* (f), a case is cited, where a journeyman who had embezzled money received for his master, and left it in his chamber in his master's house, and being discharged, entered the house in the night and took the money from the chamber, it was held to be no burglary, because the taking the money did not amount to felony—that is, to larceny—the money not having been taken out of the possession of the master.

In the case of a servant opening a door of his master's house for a felonious purpose, without any plan or conspiracy with other persons to commit a robbery, it seems to have been considered that the question, whether such act will amount to a breaking, must depend upon the point whether the door might have been opened by the servant in the course of his trust and employment. Thus, it was said, that if a servant unlatch a door or turn a key in a door of his master's house, and steal property out of the room, such opening of the door, being within his trust, is not a breaking: but that if a servant break open a door, whether outward or inward (as a closet, study or counting-house), and steal goods, such opening, not being within his trust, will amount to a breaking of the house, either within the statutes relating to the breaking of dwelling-houses in the daytime or within the law of burglary (g).

Stealing in a Shop, Warehouse, Factory, &c.

By the Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 26 (h) it is enacted that: "Every person who (1) breaks and enters any dwelling-house, or any building within the curtilage thereof and occupied therewith, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory, or workshop, or any building belonging to His Majesty, or to any government department, or to any municipal or other public authority, and commits any felony therein; or (2) breaks out of the same, having committed any felony therein; shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years."

A machine-house where a weighing-machine was kept, at which all goods sent out were weighed and a book kept in which were entered all goods weighed and sent in, and in which house the account of the time of the men was taken and their wages paid (although the books

(f) 1 Show. 53.

(g) Russ. on Crimes (7th ed.), 1069, citing 1 Hale, 354, 355; and *Edmond's Case*, 1 Hale, 554, where a servant who unlatched the stairfoot door and went with a hatchet to kill his master was held guilty of burglary. See also *R. v. Wenmouth*, 8 Cox Cr. C. 348, where a servant burst open the inner door of a shop in the night to steal money from the till.

(h) By *ibid.*, s. 27, housebreaking with intent to commit a felony, which was formerly only a misdemeanour at common law, is a felony.

were brought there for the purpose, being usually kept elsewhere), was held to be a counting-house (*i*).

Stealing in a dwelling-house to the value of £5 or more or with menaces.

It is further enacted by the Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 13 that: "Every person who steals in any dwelling-house any chattel, money, or valuable security (*k*), shall (a) if the value of the property stolen amounts to £5; or (b) if he by any menace or threat puts any person being in such dwelling-house in bodily fear; be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding fourteen years."

It is not thought necessary to encumber this work with all the decisions on this or previous statutes (*l*), which do not apply exclusively to servants; though they obviously apply to them as well as other persons. The following decisions, however, having taken place on indictments under 7 & 8 Geo. IV., against servants, could not well be omitted here consistently with the object of this work.

A shopman was charged (*m*) with stealing in a dwelling-house sixty-eight yards of lace, the property of his master. The prisoner had sent the lace (which was in several distinct pieces) from Abingdon to London in a parcel by the coach, and no one piece of lace was worth £5; whereupon his counsel suggested that *in favorem vitæ* it might be taken that the pieces of lace might have been stolen at different times; but Bolland, B., said: "I cannot assume that to have been so. We find that the lace is all sent in one parcel, and all brought out of the prosecutor's house at once, and unless you can give some evidence to show that it was stolen at different times you do not raise your point; but even if you did I should think it would be of no avail, for on the last Winter Circuit it appeared that a person at Brighton stole goods in the same way that you wish me to suppose that this person did; for it was shown that he stole the articles one or two at a time, and under value, but that he carried them out of his master's house altogether, the articles amounting in all to more than £5 value: and Mr. Baron Garrow, after much consideration, held that as the articles were all brought out of the prosecutor's house together, it was a capital offence."

Where (*n*) an under-butler was indicted for stealing his master's plate

(*i*) *R. v. Potter*, 23 L. J. M. C. 170.

(*k*) As to the meaning of "valuable security," see *ibid.*, s. 46. Currency notes are "valuable securities" (Currency and Bank Notes Act, 1914 (4 & 5 Geo. V., c. 14), s. 1 (*5*)).

(*l*) They are collected in 2 Russ. on Crimes.

(*m*) *R. v. Jones*, 4 C. & P. 217.

(*n*) *R. v. Phetheon*, 9 C. & P. 552. And see *R. v. Wright*, 9 C. & P. 554, note, where on a servant, who was indicted for stealing his master's plate, setting up as a defence his intention to replace it, Hullock, B. (Holroyd, J., being present), left it to the jury to say whether the prisoner took the plate with intent to steal it, or whether he merely took it to raise money on it for a time and then return it, for

to the value of £18 5s., in his dwelling-house, and found guilty, but the jury recommended him to mercy on the ground that they believed that he intended to replace the property, which it appeared he had pledged, a finding which the prisoner's counsel contended amounted to a verdict of not guilty; Gurney, B., without expressing any opinion on the point, directed that the prisoner should be tried on another indictment which had been found against him for stealing a silver saucepan belonging to his master. This also the prisoner had pledged; and his counsel contended that he meant to replace this also. But in summing up, Gurney, B., said: "If this doctrine of an intention to redeem property is to prevail, courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined."

Stealing Goods in Process of Manufacture.

By the Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 9: "Every person who steals, to the value of ten shillings, any woollen, linen, hempen or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed or exposed, during any stage, process or progress of manufacture in any building, field or other place, shall be guilty of felony," and being convicted thereof shall be liable to penal servitude for not more than fourteen years.

Destroying Goods in Process of Manufacture.

The Malicious Damage Act, 1861 (24 & 25 Vict. c. 97) provides by sect. 14 that: "Whosoever shall unlawfully and maliciously cut, break or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in

that in the latter case it was no larceny. To which the learned reporters add the following note: "This decision has given rise to much discussion in various cases; and much difficulty has been found in applying the doctrine it lays down to the facts of particular transactions. In some instances, where it has appeared clearly that the party only intended to raise money on the property for a temporary purpose, and, at the time of pledging the article, had a reasonable and fair expectation of being able shortly by the receipt of money to take it out of pawn, juries, under the advice of the judge, have acted upon the doctrine and acquitted. But, in other instances, where they could not discover any reasonable prospect which the party had at the time of pledging of being able soon to redeem the article, they have considered the doctrine as inapplicable and have convicted." See also *R. v. Holloway*, 2 C. & K. 944, *post*, p. 308, note (r); *R. v. Trebilcock*, 1 Dears. & Bell, C. C. 453.

any stage, process or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless (o), any warp or shute of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or shall unlawfully and maliciously cut, break or destroy or damage with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life or for any term not less than [three years (p), or to be imprisoned for any term not exceeding two years, with or without hard labour], and if a male under the age of sixteen years, with or without whipping."

The Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), contains in sect. 14 the general provision that if any person "wilfully or maliciously commits any damage to any real or personal property whatsoever, either of a public or private nature, and the amount of the damage does not, in the opinion of the Court, exceed £20," he shall, on summary conviction, be liable to imprisonment, or to be fined and to pay reasonable compensation to the party aggrieved. The provision does not apply "where the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of." A milk carrier was held (q) guilty of an offence under the similar section 52 in the Malicious Damage Act, 1861, *supra*, for damaging his employer's milk by adding water to it, with no intention of injuring his employer, but in order to make a profit for himself by increasing the bulk of the milk.

Larceny and Embezzlement by Clerks and Servants.

The two offences distinguished.

The legal distinction between these two offences is that, larceny consists in the felonious taking of property, &c., out of the possession of the master (r), whether that possession be actual or

(o) See *R. v. Fisher*, L. R. 1 C. C. R. 7.

(p) Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 1.

(q) *Roper v. Knott*, [1898] 1 Q. B. 868.

(r) In *R. v. Holloway*, 2 Carr. & K. 946, Lord Wensleydale said: "The definitions of larceny are none of them complete. East's is the most so, but that wants some explanation. His definition is 'the wrongful or fraudulent taking or carrying away by any person of the mere personal goods of another from any place with a felonious

constructive, whilst embezzlement consists in the receiving property, &c., for or on account of the master, and fraudulently appropriating it, before it reaches his possession, either actual or constructive. Morally and substantially, however, the offence is the same in both cases, and accordingly the punishment for both offences is now the same; and since Lord Campbell's Act for the Improvement of the Administration of Criminal Justice (s), a person indicted for one of those offences may be found guilty of the other.

Larceny.

At common law a servant might be guilty of felony in feloniously taking away the goods of his master, though they were goods under his charge, as a shepherd, butler, &c., and may at this day, for any such offence, be indicted as for a felony at common law; but at common law, if a man had delivered goods to his servant to keep or carry for him, and he carried them away *animo furandi*, it was doubtful whether such servant was guilty of felony, or merely of a breach of trust. These doubts gave rise to, and are recited in the stat. 21 Hen. VIII., c. 7, whereby such an offence was made felony. Subsequent decisions, however, established that where a party had only the bare charge or custody of the goods or money of another, the legal possession remained in the owner, and the party might be guilty of trespass and larceny in fraudulently converting them to his own use (t). This rule holds universally in the case of servants whose possession of their master's goods by delivery of their master is held to be the possession of the master himself, where the master only intended to part with the custody of the goods, and if the servant converts such goods to his own use it is larceny, whether he had a felonious intent at the time he received them, or conceived such an intention afterwards (u). Thus, in the case of a butler, or other servant, to whose care a master intrusts his plate or other goods, it has uniformly been held that such servants are guilty of felony by embezzling such plate or goods, or taking them fraudulently away; and this doctrine is not confined to menial servants

intent to convert them to his (the taker's) own use and make them his own property, without the consent of the owner.' This is defective for not stating what the fraudulent taking is, and what the felonious intent is; this may be explained, that the 'taking' is without any colour of right, and the 'intent' an intent to deprive the owner permanently of the property. Cases also show that a taking of goods with an intent to return them is not larceny."

(s) 14 & 15 Vict. c. 100, s. 13. That section was repealed by 24 & 25 Vict. c. 95, but 6 & 7 Geo. V. c. 50, s. 44 (2), *post*, p. 338, is a similar enactment.

(t) Bac. Abr. Master and Servant, M. 2; Hale's Hist. P. C. 505; 2 East, P. C. c. 16, s. 14, p. 564; see also Russ. on Crimes (7th ed.), 1359.

(u) To incite a servant to steal his master's goods is a misdemeanour, although it be not charged in the indictment that the servant stole the goods, nor that any other act was done, except the soliciting and inciting: *R. v. Higgins*, 2 East, 5; *R. v. Gregory*, L. R. 1 C. C. R. 77. If the felony has been committed by the servant, the "counselling, procuring or commanding" it to be committed is a felony by 24 & 25 Vict. c. 94, s. 2. See *ibid*.

only, for it appears, both by Hale and Hawkins, that if a shepherd who has the care of sheep, and who, from the nature of his employment, must be constantly in the pastures, takes away any part of the flock with intent to steal it, he is guilty of felony although the plate is actually delivered to the butler (*x*), and the sheep to the shepherd; for the possession still remains in the master (*y*). Lord Coke says (*z*) "these things be *in onere, et non in possessione, promi, coci, pastoris, &c.*" And this law prevails in all cases where servants have not the absolute dominion over the property, but are only intrusted with the care or custody of it for a particular purpose (*a*) .

Thus, a foreman and book-keeper to a mercer, not residing in his master's house, but going there every day to transact business, who received from his master certain bills to send to a correspondent by post, in the usual course of business, but, instead of sending them all, kept back one, for which he obtained cash, and absconded with the money, was held rightly convicted of larceny; as the possession of the bill still remained in his master (*b*). So a carter going away with his master's cart was holden to have been guilty of felony (*c*). So where a tradesman's servant and porter was sent with a package of goods from his master's house with direction to deliver them to a customer, but by the way opened the package, sold the goods, and pocketed part of the price, all the judges held this to be felony (*d*).

And so where a corn-factor, having purchased a cargo of oats, sent his servant with a barge to receive part of the oats in loose bulk, and the servant ordered some of the oats to be put into sacks, which he afterwards embezzled, the judges held it to be larceny (*e*).

(*x*) In *R. v. Ashley*, 1 Carr. & K. 198, it was held that plate belonging to a club could not be described as the property of the house steward in an indictment against a member of the club for stealing it. But see *R. v. Burgess*, 32 L. J. M. C. 185, where it was held that a member of a co-operative society might be convicted of larceny from B., a servant of the society, for stealing from B.'s till in the shop of the society money received for goods of the society sold by B. as their servant, for which he was personally accountable.

(*y*) See per Gould, J., in 1 Leach, 523.

(*z*) 3 Inst. 108.

(*a*) Upon this principle it was held in *R. v. Wilkins*, 1 Leach, 520, that to obtain goods by false pretences from the servant of the owner to whom they were delivered for the purpose of being carried to a customer who had purchased them, was a taking from the possession of the master: and a person so taking them with a preconceived design to steal them was guilty of felony. See *R. v. Johnson*, 21 L. J. M. C. 32.

(*b*) *R. v. Paradise*, 2 East, P. C. 565, cited by Gould, J., in 1 Leach, 523; and see *R. v. Metcalfe*, Moo. C. C. 433.

(*c*) *R. v. Robinson*, 2 East, P. C. 565. A servant going off with his master's box and his master's wife was held guilty of larceny of the box: *R. v. Mutters*, 34 L. J. M. C. 54. Evidence of a confession of guilt to his master was held admissible in *R. v. Jarvis*, L. R. 1 C. C. R. 96.

(*d*) *R. v. Bass*, 2 East, P. C. 566.

(*e*) *R. v. Spears*, 2 East, P. C. 568. In *R. v. Walsh*, 4 Taunt. 276, Heath, J., said: "That case went upon the ground that the corn was in the prosecutor's barges, which was the same thing as if it had been in his granary." See also *R. v. Reed*, Dears. C. C. 257; and see *R. v. Abrahams*, 2 East, P. C. 569; *Aldridge v. Johnson*, 7 E. & B. 885; *R. v. Bunkall*, 33 L. J. M. C. 75.

So a servant going off with money given to him by his master to carry to another, or get changed (*f*), and applying it to his own use, was holden guilty of larceny (*g*).

And so it was held to be larceny for the confidential clerk of a merchant to take a bill of exchange unindorsed from its proper repository, discount it, and convert the proceeds to his own use; although he had the general management of his master's cash concerns, and authority to get bills discounted (*h*).

And so, in the following case the prisoner was held guilty of larceny (*i*). The prisoner W. was employed by a banking company to conduct a branch bank, and the whole of the duties thereof were discharged by him alone. He was paid £150 a year, for which he was bound to provide a place for carrying on the business, and the place so provided was in his own house, where he carried on business as a wine merchant. The office was fitted up at the expense of the bank, and in it there was an iron safe provided by the bank, into which it was W.'s duty to put any money received during the day, which had not been required for the purposes of the bank. There were duplicate keys of this safe, one in W.'s custody and one under the control of the manager of the bank. W. furnished weekly accounts of moneys received and paid by him, showing the balance in his hands, and of what notes, &c., the balance consisted. In September, 1855, W.'s accounts were audited, and the cash found correct, but although for two years afterwards he furnished the usual weekly accounts, no examination was made during that time of the balances in his hands. In September, 1857, the manager having appointed a time for examining the cash in W.'s hands, he said he was about £3,000 short in his cash, and handed over to the manager £755 10s., which he said was all the cash he had left, and which he took from a drawer in the counter, not from the safe. Afterwards, when before the magistrates on a charge of embezzling the £3,000, he said, "I admit that I have taken the amount of money which appears in my weekly return, dated September 12, 1857, and entered as a deficiency of £3,021 9s. 9d." The jury found W. guilty of larceny as a clerk in having stolen *some money* received from customers, which, before such stealing, had been placed in the safe and made the subject of a weekly account. And it was held by the Court for the Consideration of Crown Cases Reserved, that there was evidence that W., as his duty required, placed in the safe money which had been previously received from customers, that he thereby determined his own exclusive possession of the money, and that by afterwards taking some of such

(*f*) *R. v. Goode*, Carr. & M. 582; *R. v. Smith*, 1 C. & K. 423; *R. v. Cooke*, L. R. 1 C. C. R. 295. Where one workman, who was sent to the pay-table to get money for four, stole it, it was held to be the money of the four *workmen*, and not of the *master*: *R. v. Barnes*, L. R. 1 C. C. R. 45.

(*g*) *Lavender's Case*, Huntingdon Lent Ass. 1793, twice considered by the judges, East. T. 1793, and Trin. T. 1793. (*h*) *R. v. Chipchase*, 2 East, P. C. 567.

(*i*) *R. v. Wright*, 1 Dears. & Bell, C. C. 431.

money out of the safe, *animo furandi*, he was guilty of larceny. It was also held, that the finding, that W. stole "*some money*," was sufficiently certain, as it was not necessary that they should find that any specific amount was stolen on any particular day.

And where some barilla, which the prosecutors had bought, was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, and he allowed other persons to take away the cart and dispose of the barilla for his benefit jointly with that of the other persons, it was held that he, as well as the other persons, was guilty of larceny at common law (*k*).

Again, where (*l*) a man sent his servant with his (the master's) cart to the railway station for some coals, which were put into the cart, and on the way home the servant, without authority from his master, disposed of some of the coals to a third person, he was held to be guilty of larceny, as the coals having been placed in the master's cart, were not in the exclusive possession of the servant, but constructively in the possession of his master.

And so a person employed to drive cattle to a particular place, who had no authority to sell the cattle, but did so, and converted the money to his own use, having had a felonious intent at the time he received charge of the cattle, was held guilty of larceny of the cattle.

Thus (*m*), the prosecutor saw the prisoner at Bristol fair, and hired him to drive fifty sheep for him from Bristol to Bradford fair. This was on a Thursday, and the prisoner, with the sheep, was to meet the prosecutor on the following Sunday evening at the turnpike-gate, nearest to Bradford. The prisoner had no authority to sell the sheep, but was only to drive them to Bradford, for which he was to receive two shillings and sixpence per day. The prisoner never was a servant of the prosecutor, but had been occasionally employed to drive sheep, and he never had authority to sell. The prisoner never went to Bradford, but sold the sheep, telling the purchaser he had authority to do so. The jury found that the prisoner at the time he received the sheep intended to convert them to his own use, and not to go to Bradford. And he was convicted of felony, which conviction was afterwards held right by the judges.

(*k*) *R. v. Harding*, Russ. & Ry. 125. Where a master, finding some brass castings in the pocket of a thief, sent for a policeman, and they were taken out, but afterwards given back to the thief, who by the master's direction took them to the house of the person to whom he had intended to sell them, and sold them to him and gave his master the price, it was held that that person could not be convicted of receiving stolen goods: *R. v. Dolan*, 24 L. J. M. C. 59, approved and followed in *R. v. Schmidt*, L. R. 1 C. C. R. 15; and *R. v. Villensky*, [1892] 2 Q. B. 597.

(*l*) *R. v. Reed*, 23 L. J. M. C. 25. This case was twice argued, and long considered, but ultimately decided upon the authority of *Spears' Case*, *supra*, p. 310; but Lord Wensleydale said that if it were *res nova* he should have pronounced an opinion that the prisoner's offence was not larceny. See, also, *R. v. Norval*, 1 Cox C. C. 95.

(*m*) *R. v. Stock*, 1 Moo. C. C. 87. But see as to drovers generally, *R. v. Hey*, *post*, p. 317.

So a servant who receives goods from his master, on the master's account, and wrongfully appropriates them, is not guilty of embezzlement, but of larceny (*n*).

And a contractor's servant who used false weights with intent to steal the difference between the true and false weights, was convicted of attempting to steal (*o*).

In the following case (*p*), however, it was held, that under the circumstances, a clerk ought to have been indicted for false pretences.

At a savings bank the course of business was this:—The depositor gave a notice to the clerk of the amount required, and if present on next night of business received a cheque from the manager; if absent he allowed the clerk to receive and cash such cheque, and keep the cash till called for, and both depositor and clerk signed the book. The clerk, by falsely pretending to the manager that G. had given notice for £50, and was not in attendance, obtained from the manager a cheque for £50, and afterwards the cash, which he pocketed; it was held, that he ought to have been indicted for false pretences, and not for larceny, as he acted as agent for the depositor.

If a servant who has authority to sell, and enter the sale in a book, do sell, but omits to make an entry of the sale in the book, and pockets the price, he cannot be convicted of larceny of the goods, but of embezzlement of the money (*q*). But if a servant who has no authority to sell part with his master's goods, under colour of a pretended sale, to a purchaser, both servant and purchaser may be indicted for larceny (*r*).

And if a servant take his master's property, and hand it over to another as a gift, it is as much a felony as if he sell it, or take it to a pawnbroker and pledge it. In a case, therefore, where (*s*) a cook, out of compassion, as she alleged, gave away a bundle containing

(*n*) *R. v. Hawkins*, 1 Den. C. C. 584. It is said by the Court in *R. v. Whittingham*, 2 Leach, 913, that "if a servant received money, either from the master, or from a third person on his master's account," he was guilty of embezzlement; but in *R. v. Hawkins* Lord Truro said: "The dictum in *R. v. Whittingham* must be associated with some facts which do not appear in the report of the case." See also *R. v. Metcalfe*, 1 Moo. C. C. 433, where the prisoner was held properly convicted of larceny for appropriating a cheque which he received from his master to pay a creditor: *R. v. Johnson*, 21 L. J. M. C. 32; *R. v. Poyser*, 5 Cox C. C. 241.

(*o*) *R. v. Cheeseman*, 31 L. J. M. C. 89.

(*p*) *R. v. Essex*, 27 L. J. M. C. 20. By the Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 44, a defendant indicted for stealing, but proved to have taken any chattel, money, or valuable security in such manner as to amount in law to obtaining it by false pretences with intent to defraud, may be found guilty of obtaining by false pretences; and if indicted for false pretences but proved to have stolen the property in question, he is not by reason thereof entitled to be acquitted of obtaining by false pretences.

(*q*) *R. v. Betts*, 28 L. J. M. C. 69; *R. v. Brackett*, 4 Cox C. C. 274.

(*r*) *R. v. Hornby*, 1 C. & K. 305; *R. v. Tideswell*, [1905] 2 K. B. 273.

(*s*) *R. v. White*, 9 C. & P. 344. Where certain friends of the servants were entertained by them at night without their master's leave, it was held that the justices might have convicted the friends under the Vagrant Act (5 Geo. IV. c. 83), s. 4, as being in the house for an unlawful purpose: *Kirkin v. Jenkins*, 32 L. J. M. C. 140.

bread, candles, soap and butter, done up in one of her master's towels (altogether not worth eighteenpence), she was convicted of larceny, and she, as well as the receiver, were sentenced to imprisonment.

Where a nursery-maid, who was indicted for stealing banknotes, the property of her master, in his dwelling-house, set up as her defence, that she found them in the passage, and, not knowing to whom they belonged, kept them to see if they were advertised: it was held, that she ought to have inquired of her master whether they were his or not; and that not having done so, but having taken them away from the house, she was guilty of stealing them (t).

And it was formerly held (u) that a servant who clandestinely took his master's corn was guilty of felony, although he took it to give to his master's horses, and without any intention of applying it to his own private benefit. But this offence is not now a felony, but is punishable on summary conviction before two justices (x).

The prisoner was employed as a puddler by an iron company. The puddlers employed were in the habit of receiving a certain quantity of pig-iron which they put into the furnaces, and they were paid for their work according to the quantity drawn out of the furnace and formed into puddle-bars. The prisoner put an iron axle (not pig-iron) belonging to his masters into the furnace, by the melting of which, in addition to the pig-iron, his profit would be increased about 1d. Tindal, C.J., at first doubted whether the act of the prisoner, though unquestionably fraudulent and wrong, came within the definition of larceny, as the iron was to come back to the owners in the same substance, though in another form; but, upon the counsel for the prosecution citing *R. v. Morfit*, and such cases, left it to the jury to say whether the prisoner put the axle into the furnace with a felonious

(t) *R. v. Kerr*, 8 C. & P. 176. See *R. v. Thurborn*, 2 C. & K. 831, where it was held that if a person finds goods that have been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, but reasonably believing that the owner can be found, it is larceny. But if he have no intention of appropriating them *at the time of finding*, the subsequent conception of such an intention would not convert the honest taking into a dishonest one, and so make him a felon by relation: *R. v. Preston*, 21 L. J. M. C. 41; *R. v. Dixon*, 1 Dears. C. C. 580; *R. v. Christopher*, 28 L. J. M. C. 35; *R. v. Moore*, 30 L. J. M. C. 77; *R. v. Glyde*, L. R. 1 C. C. R. 139.

(u) *R. v. Morfit*, R. & R. 307; *R. v. Handley*, Carr. & M. 547; *R. v. Privett*, 2 Carr. & K. 114; 1 Den. C. C. 193. In the last report of the last case, it is said that although all the judges agreed that they were bound by previous decisions to hold it to be larceny, several of them expressed a doubt if they should have so decided if the matter were *res integra*. The following passage in Hanna's "Life of Dr. Chalmers," vol. i. p. 412, may assist the deliberations of those who still doubt on this matter. "Examining once at a farmhouse, one of the ploughmen was called up. The question in order was: 'What is the Eighth Commandment?' But what is stealing? 'Taking what belongs to another and using it as if it were your own.' Would it be stealing, then, in you, to take your master's oats or hay contrary to his orders, and give it to his horses? This was one of the many ways in which he (Dr. C.) sought to instil into the minds of his people a high sense of justice and truth, even in the minutest transactions of life."

(x) The Misappropriation by Servants Act, 1863 (26 & 27 Vict. c. 103).

intent to convert it to a purpose for his own profit, for if he did so this was larceny. The jury found the prisoner guilty (y).

And where a carter, who was allowed by his master a small quantity of hay for the use of the horses on their journey to and from London, took from his master's stables two trusses of hay above the quantity allowed, and put them on the tail of his master's waggon, and afterwards the ostler at a public-house on the roadside received them from the carter; it was held that the carter was guilty of larceny, that the larceny was complete the moment the hay got into the cart *animo furandi*, and, therefore, that the ostler was properly indicted for receiving the hay, knowing it to have been stolen; but that if it had been hay allowed for the horses which was stolen it would have been otherwise (z).

In *R. v. Hall* (a), where a servant took his master's goods to his master and endeavoured to induce him to purchase them, pretending that the goods were sent by a person with whom the master dealt, it was held to be larceny. But in *R. v. Webb* (b), it was held not to be larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners, ore produced by them and add it to their own, in order to increase their wages; the ore still remaining in the possession of the owners. And upon the authority of that case it was held in *R. v. Holloway* (c) not to be larceny for a workman in the employ of a tanner to take skins from his master's warehouse to the foreman at another part of the premises, pretending that he had done work on them for which he was to be paid, and intending to return the skins to his master after he had been paid for his pretended work, but an attempt to commit the misdemeanour of obtaining money by false pretences. And the authority of *R. v. Holloway* was acted upon in the following case (d):—The prisoners were indicted for stealing. The master was a glove-maker, and the prisoners were in his employ as glove-finishers. When they had done any work the practice was to take the finished gloves to an upper room and lay them on a table, in order that the workmen might be paid according to the number finished. The prisoners broke open a store-room on their master's premises, took out a quantity of finished gloves and laid them on the table in the upper room, with intent fraudulently to obtain payment for them as for so many gloves finished by them. The gloves were

(y) *R. v. Richards*, 1 C. & K. 532.

(z) *R. v. Gruncell*, 9 C. & P. 365.

(a) *R. v. Hall*, 2 Car. & K. 947; *R. v. Manning*, 22 L. J. M. C. 21. See *R. v. Beecham*, 5 Cox C. C. 181, where a man was convicted of larceny of a railway ticket although given up.

(b) Moo. C. C. 431. Patteson, J., dissented. Compare Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 11.

(c) 2 Carr. & K. 944.

(d) *R. v. Pool*, 27 L. J. M. C. 53.

never off the master's premises. It was held that they could not be convicted of larceny as they claimed no property or lien on the gloves, and had not sold, or attempted to sell them, as in *R. v. Hall* (e).

Where a foreman made out and rendered to his master, A., an account of £14 as due from A. to his workmen, and A. gave him a cheque for the amount, all of which was due except 7s., which the foreman kept when he got the cheque cashed, and paid the workmen the rest; it was held that the foreman might be convicted upon an indictment which charged that by this false pretence he obtained the cheque from A. with intent to defraud him of the same (f).

And where a clerk made out a false account of customs dues and obtained the amount from his master's cashier, pocketing the difference between the true and the false amount, he was held guilty of obtaining money under false pretences (g). And it has also been held that he might be indicted for stealing the difference, as whilst it remained in his custody it was in the possession of his master (h).

But in the following case (i), of a somewhat similar nature, the indictment was held bad, and the prisoner escaped punishment:—A. worked for the prosecutors as a journeyman, and the quantities of work done by him for them during each week were entered in a book kept for that purpose. The prices for the work so entered were placed in a column opposite to each quantity of work, and added up on behalf of the prosecutors at the end of each week. The weekly totals of these prices were entered by them in this book, and the amount of the totals paid by them to O. as the ascertained sum due to him for work done, on the production by him of this book. After these weekly totals had been entered as above, O. altered them into larger amounts, and then procured payment of the larger amounts on producing the books, and afterwards erased the larger amounts and restored the figures of the original totals. He was indicted for obtaining money by false pretences. The indictment in some counts averred that he falsely pretended that, he having executed certain work, there was a certain sum of money due and owing to him for and on account of the work, being parcel of a larger sum claimed by him, whereas there was not then due and owing to him such money, being parcel of a larger sum. And in other counts it was averred that he falsely pretended that there was due and owing to him the whole amount of a sum of money for and on account of certain work executed by him, whereas there was not then due and owing to him the whole amount of such sum of money, but only a smaller sum. It was held that the indictment was bad, as a false pretence of an existing fact was not sufficiently alleged,

(e) *Supra*, p. 315.

(f) *R. v. Leonard*, 2 C. & K. 514.

(g) *R. v. Thompson*, 32 L. J. M. C. 57. See *R. v. Barnes*, 2 Den. C. C. 59.

(h) *R. v. Cooke*, L. R. 1 C. C. R. 295.

(i) *R. v. Oates*, 1 Dears. C. C. 459.

and the averments would be proved by evidence of a mere wrongful overcharge.

And again, where (*k*) a workman stated that he had done more work than he really had, and requested payment for the work he stated he had done, and his master knowing that it was a false overcharge, and wishing to entrap him, paid him the amount demanded, it was held that the workman could not be indicted for obtaining money under false pretences, as it was not the falsehood which induced his master to part with the money.

If a weaver or silk-throwster deliver yarn or silk to be wrought by his journeymen in his house, and they carry it away and convert it to their own use, this is larceny at common law, but if to be wrought out of the house it is not, for the journeymen in that case are considered bailees and not servants (*l*). They may, however, now be convicted of larceny under sect. 1 (1) of the Larceny Act, 1916 (6 & 7 *Geo. V. c. 50*), which provides that a person may be guilty of stealing anything 'capable of being stolen, "notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner" (*m*).

Where a master parts not only with the custody, but also with the possession, of goods to a servant, and the servant converts them to his own use, it is not larceny at common law unless he had a felonious intent at the time (*n*) he received them. And therefore in the case of drovers (*o*) and other servants intrusted with goods with authority to sell and receive the purchase-money, if such servants sell and embezzle the money, the offence will not be larceny at common law unless the servant had a felonious intent when he took possession of the goods (*p*). As already pointed out, however, larceny by a bailee has now been made possible by statute.

It has been held (*q*) that a drover by trade, who was employed to drive pigs to a particular place, was paid by the day, and by the custom of the trade had a right to drive other persons' cattle also, but who sold the pigs and absconded with the money, could not be convicted of larceny as a servant, as he was a mere bailee and not a servant,

(*k*) *R. v. Mills*, 26 L. J. M. C. 79. There may, however, be a conviction for attempting to obtain by false pretences : *R. v. Light*, 84 L. J. K. B. 865.

(*l*) *East*, P. C. 682, 683; *R. v. Seward*, 5 Cox C. C. 295.

(*m*) By *ibid.*, s. 47 (2), where the offence is punishable only on summary conviction, it shall remain only so punishable. This proviso was introduced to prevent the clause applying to the cases of persons employed in the silk, woollen, and other manufactures, who dispose of goods entrusted to them, and are liable to be summarily convicted under sundry statutes. It was held, under sect. 3 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), that the person must be bound to return the identical goods or coin deposited : *R. v. Hassall*, 30 L. J. M. C. 175.

(*n*) *R. v. Flowers*, 16 Q. B. D. 643.

(*o*) *R. v. Goodbody*, 8 C. & P. 665.

(*p*) *R. v. Evans*, Carr. & M. 632; and see *R. v. Glass*, 2 Carr. & K. 395.

(*q*) *R. v. Hey*, 2 Carr. & K. 983; *R. v. Gibbs*, 1 Dears. C. C. 445.

and had no original intention of stealing the pigs. In that case the prisoner was convicted, but the question having been reserved for the consideration of the judges, the conviction was held improper. In giving judgment in that case, Lord Wensleydale said: "The question is whether, on the facts stated in this case, the prisoner received the custody of the pigs as a servant of the prosecutor, or as a bailee; in the latter case he could not be guilty of larceny, unless he had intended to appropriate them to his own use at the time of the receipt, which was not the case; in the former he would be guilty of larceny, according to the finding of the jury; as to which they were properly directed by the learned assistant barrister. There are several reported cases bearing upon the question, whether a person is a mere servant or a bailee. There are none precisely like the present, though the case of *Rex v. Bernard M'Namee* (r) nearly approaches it. In this case, on the one hand, the circumstance that the prisoner was paid the expenses of the cattle, and also that the customary mode of his remuneration was by the day, tend to show that he was a mere servant; on the other, the fact of his being a drover by trade, and also of his having the liberty to drive the cattle of any other person by the general usage with respect to drovers, raises an inference that he was not a servant. The learned assistant barrister felt himself bound by the decision of the judges in the case of *Reg. v. Hughes* (s), but that case was under the statute 7 & 8 Geo. IV. c. 29, s. 47, which makes embezzlement by a servant, or person employed in the capacity of a servant, to receive money, felony; and the learned Recorder of London referred the question to the judges, whether the prisoner fell under either description, though if the indictment had been referred to, it was necessary to prove that he was a servant. The judges decided that the prisoner was properly convicted, and consequently that he was a servant or person employed in that capacity, and authorised as such to receive money, so that his receipts would be a discharge to the debtor. This is almost exactly the same question; it is whether the prisoner had the custody of the cattle as a servant to the prosecutor at the time of the receipt of them, and we think he could not be so considered, unless in driving the cattle to market he was his servant, and the prosecutor responsible for any negligent act of his in so driving them. This subject has undergone much discussion of late, and has been placed on its proper footing by the case of *Quarman v. Burnett* (t),

(r) 1 Moo. C. C. 368. In that case a general drover, who had been employed by the prosecutor off and on for nearly five years, but not as a regular servant, and was employed to take some sheep to G. fair, being paid 3s. a day, sold the sheep entrusted to him without having authority to do so, and pocketed the money, was held properly convicted of felony, as he had merely the custody of the sheep and his possession was his master's, and he had no intention of stealing the sheep at the time he received them. And see *R. v. Jackson*, 2 Moo. C. C. 32.

(s) 1 Moo. C. C. 370.

(t) 6 M. & W. 499.

and other cases; one of which is that of a general drover, who was held in the case of *Milligan v. Wedge* (*u*) not to be a servant, so as to make the owner of the cattle responsible for his negligence. After the full consideration which this subject has undergone, we doubt whether the case of *Rex v. Bernard M'Namee*, above referred to, would now be decided in the same way. Upon the whole we think it was not proved in this case that the prisoner was a mere servant, and the conviction was improper."

Where a prisoner is indicted for larceny as a servant, he may be convicted of simple larceny, as proof of the allegation in the indictment that he was a servant, is only necessary for the purpose of convicting him of the compound offence. If, therefore, a prisoner is indicted as servant of A., and he turn out to be the servant of B., he should be convicted of simple larceny (*x*).

The prosecutor gave his mare to the prisoner to look after for a few days, and then to sell it for him. The prisoner sold the mare, but declined to give up the money, and eventually absconded with it. He was indicted at sessions for embezzlement of the money. The deputy chairman ruled that there was no evidence to go to the jury of the defendant's employment as a servant, and the jury returned a verdict of guilty of larceny. Upon a case being reserved, the Court for Crown Cases Reserved were of opinion (Stephen, J., dissenting) that the prisoner was guilty of larceny as a bailee (*y*).

Should the evidence fail to prove the complete offence, the prisoner may be convicted of an attempt to commit it (*z*).

Various statutes have at different times been passed with a view to the prevention of the crime of larceny by servants, by the subjection of such persons to a heavier punishment than awaits ordinary offenders (*a*). These statutes, however, were all repealed by 24 & 25 *Vict. c. 95*, and at the same time the law upon the subject was consolidated in the Larceny Act, 1861 (24 & 25 *Vict. c. 96*). Much of this latter statute has in turn been superseded by the Larceny Act, 1916 (6 & 7 *Geo. V. c. 50*). Certain classes of public servants incur a heavier

(*u*) 12 A. & E. 737.

(*x*) *R. v. Jennings*, 1 Dears. & B. 447.

(*y*) *R. v. de Banks*, 13 Q. B. D. 29.

(*z*) Criminal Procedure Act, 1851 (14 & 15 *Vict. c. 100*), s. 9; *R. v. Cheeseman*, 31 L. J. M. C. 89.

(*a*) Formerly, both by the common law and also by the Treason Act, 1351 (25 *Edw. III. st. 5, c. 2*), it was petit treason for a servant to kill his master or mistress. So much of the stat. 25 *Edw. III.*, however, as relates to petit treason was repealed by 9 *Geo. IV. c. 31*; and now by the Offences Against the Person Act, 1861 (24 & 25 *Vict. c. 100*), s. 8, it is enacted that every offence which before the 1st of July, 1828, would have amounted to petit treason "shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried and punished as principals and accessories in murder." The 21st section of 5 *Eliz. c. 4*, which provided a special punishment for assaults committed by servants on masters, was repealed by 9 *Geo. IV. c. 31, s. 1*, and the offence is now punishable in the same way as assaults committed by other persons.

punishment still if they offend. So by the Larceny Act, 1916 (*supra*), s. 18, officers of the Post Office who steal or embezzle a postal packet in course of transmission by post are liable, if the postal packet contains any chattel, money or valuable security, to penal servitude for life, and in all other cases to penal servitude for seven years (b). And by sect. 19 of the same statute officers or servants of the Bank of England or the Bank of Ireland are made liable to penal servitude for life if they secrete, embezzle or run away with any of the items of property recited (c).

By sect. 17 of the Larceny Act, 1916, it is enacted that: "Every person who, being a clerk or servant or person employed in the capacity of a clerk or servant, steals any chattel, money or valuable security (d) belonging to or in the possession or power of his master or employer . . . shall be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding fourteen years, and in the case of a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable."

Larceny or embezzlement by a clerk or servant may be dealt with summarily under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), if the prisoner plead guilty.

In order to convict a person of the aggravated offence of larceny as a servant, and subject him to the increased punishment provided for that offence, it is of course necessary that he should be a servant. We shall hereafter, whilst treating of embezzlement by servants, place before the reader the various decisions upon this point.

The cases of public servants under the Crown, and of persons employed in the police, or appointed to any office or service by or under a local marine board, are specially provided for by sect. 17 of the Larceny Act, 1916 (e).

Embezzlement.

Where the money or other property has never been in the possession of the master, it was held that the servant was not guilty of larceny in misappropriating it. There could be no tortious taking in the first instance, and consequently no trespass, without which there could be no larceny (f). Thus, where (g) a shopman sold goods in the shop

(b) See, further, the Post Office Act, 1908 (8 Edw. VII. c. 48), ss. 50 *et seq.*

(c) See also Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 6, which is not repealed by the Forgery Act, 1913.

(d) See *ante*, p. 306, note (k), and *R. v. Hampton*, 84 L. J. K. B. 1137.

(e) See also the Public Stores Act, 1875 (38 & 39 Vict. c. 25), s. 9.

(f) See Russ. on Cr. (7th ed.), p. 1370.

(g) *Bull's Case*, cited 2 Leach, 841. Upon the authority of this case, it was held in *R. v. Headge*, Russ. & Ry. 160, that a servant, under similar circumstances,

and pocketed the price, instead of putting it into the till, it was held that he could not be convicted of larceny of the money, as it had never been in his master's possession. The same law was laid down in a case where (*h*) a banker's clerk pocketed a £100 note instead of putting it into his master's drawer. These decisions gave rise to the first statute against embezzlement, 39 *Geo. III. c. 85*. That statute, as well as 7 & 8 *Geo. IV. c. 29*, is now repealed; and the punishment of such offences is provided for by the Larceny Act, 1916 (6 & 7 *Geo. V. c. 50*), s. 17, the provisions of which will be stated presently. However, since the passing of 7 & 8 *Geo. IV.*, it has been held that if the master has had possession of property, either by his own hands or by the hands of his clerk or servant, a servant cannot be guilty of embezzling it, but if he purloin it, it will be larceny. Thus, where (*i*) a clerk in the employ of A. received from another clerk £3 of A.'s money to pay for an advertisement, for which he only paid 10s., but charged A. 20s., pocketing the difference, all the judges held that he was not properly convicted of embezzlement under 7 & 8 *Geo. IV. c. 29*, s. 47.

But if such property is merely in the course of passing to the master, and have not arrived into his possession, although in the hands of a clerk, if that clerk misappropriate it, he will be guilty of embezzlement. Thus, where (*k*) it was the duty of A.'s clerks to receive money on account of A., and pay it over to A.'s superintendent, whose duty it was to pay it over to the prisoner, whose duty it was to pay it over to A.'s cashier, these persons being all servants of A., the prisoner, having received money in this way and embezzled it, was held to be properly convicted of embezzlement under 7 & 8 *Geo. IV. c. 29*, s. 47.

And if the property has once completely arrived into the master's possession (although merely constructively by the hands of the thief) and be there misappropriated, the offence will be larceny. Thus in *R. v. Watts* (*l*), the prisoner was a clerk in the Globe Insurance Office, and it was his duty to receive from the messenger the banker's pass-book, together with the vouchers, to compare the entries in the

was properly indicted for embezzlement under the stat. 39 *Geo. III. c. 85*. And see *Waite's Case*, 1 Leach, 28, the case of a clerk in the Bank of England purloining a bond, which gave rise to the stat. 15 *Geo. II. c. 13*.

(*h*) *Bazeley's Case*, 2 Leach, 835. In *R. v. Rudick*, 8 C. & P. 237, a servant, sent out to collect money for his master, was robbed of it on his way home. In an indictment for the robbery the money was laid as the property of the master, and upon an objection to this being taken by counsel for the prisoners, Alderson, B., directed a fresh bill to be sent up to the grand jury, laying the money as the property of the servant, adding: "It is difficult to see how such an offence as embezzlement could have been a part of our criminal law, if the possession of the servant of property which had never come to the hands of the master were construed to be in the possession of the master."

(*i*) *R. v. Murray*, 1 Moo. C. C. 276; 5 C. & P. 145, note.

(*k*) *R. v. Masters*, 2 Carr. & K. 930. But see Russ. on Cr. (7th ed.), p. 1369, note.

(*l*) 2 Den. C. C. 14.

pass-book with the entries in the books of the company, and to preserve the vouchers for the use of the company. One day the prisoner fraudulently destroyed a cheque for £1,400, which was delivered to him with the pass-book in the usual way, and altered the pass-book, having, in fact, paid the amount into his own private bankers, and he was held to have been properly convicted of stealing the cheque from his masters, as his possession of it was the possession of his masters.

“The paper in question,” said Lord Truro, “as soon as it had passed from the hands of the messenger, and arrived at its ultimate destination, the custody of the prisoner for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose he was guilty of stealing it from them, as a butler, who has the keeping of his master’s plate, would be guilty of larceny if he should receive plate from the silversmith for his master at his master’s house, and afterwards fraudulently convert it to his own use, before it had in any other way than by his act of receiving come to the actual possession of the master.

“This case is distinguishable from those in which the goods have only been in the course of passing towards the master, as in *Reg. v. Masters (m)*, where the prisoner’s duty was only to receive the money from one fellow-servant and pass it on to another, who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner’s keeping, and that keeping being for his masters, made his possession theirs.”

A similar decision was arrived at in the following case (*n*). The prisoner was employed by a banking company to manage a branch for them at B. He provided an office for the bank in his own house. The office was furnished by the company, and an iron safe provided there by them, of which there were duplicate keys, the company keeping one, and the prisoner the other. It was the duty of the prisoner to receive money from customers, to place it at night in the safe, to pay away from time to time as much as was required for the business of the bank, to pay cheques, to pay over weekly any balance not required for the business at B., and to send in weekly accounts to the company. He carried on the business, receiving and paying money, and sending in weekly accounts. In auditing his accounts a deficiency of £3,000 was discovered, and he admitted that he had taken that amount of money. It was held that he was properly convicted of larceny, as a clerk, in having stolen some money received from customers, which before he stole it had been placed in the safe, and made the subject of

(*m*) *Supra*, p. 321.

(*n*) *R. v. Wright*, 1 Dears & B., C. C. 431. In this case it was assumed that the money was placed in the safe, as it was the prisoner’s duty to place it there.

a weekly account; the Court considering the case similar to the ordinary one of a shopman robbing a till.

The question, therefore, as to what amounts to a delivery to the master, is one of importance. Some cases on this point have already been considered (o).

Where a man sent his servant to fetch home some straw which he had bought, and the servant brought it home, took it into his master's court-yard, and put it down at the stable door, which was locked; and afterwards, on the door being opened, put part of the straw into the hay loft, but took the rest away again, and sold it, *Tindal, C.J.*, held that the putting it down at the stable door was a delivery of it to the master, and that the servant could not be convicted of embezzlement. He was found guilty of larceny (p).

By the Larceny Act, 1916 (6 & 7 *Geo. V* c. 50), s. 17, it is enacted, that "Every person who being a clerk or servant or person employed in the capacity of a clerk or servant, fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, shall be guilty of felony," and on conviction thereof liable to the same punishment as for larceny by a clerk or servant.

Embezzlement by persons employed in the public service of His Majesty or in the police, and the fraudulent disposition of property by persons appointed to any office or service by or under a local marine board, are specially provided for under the same section (q).

Embezzlement by clerks or servants, &c., under forty shillings, may also be dealt with summarily under the Summary Jurisdiction Act, 1879 (r), if the prisoner consents or pleads guilty.

In order to constitute an offence within the above section three things must concur (s).

1. The prisoner must be (t) a clerk or servant, or employed in the capacity of a clerk or servant. •

2. He must receive or take into his possession some chattel, money or valuable security, for or in the name or on account of his master or employer.

3. He must fraudulently embezzle the same or some part thereof.

A former Act relating to this offence contained the words "by virtue of his employment." But this phrase led to some difficulties, and was therefore designedly omitted from the Larceny Act, 1861 (u).

(o) Such as *Spears' Case*, ante, p. 310; *R. v. Reed*, ante, p. 312.

(p) *R. v. Hayward*, 1 C. & K. 518; *R. v. Roberts*, 3 Cox, C. C. 74.

(q) See also the Embezzlement by Collectors Act, 1810 (50 *Geo. III.* c. 59), s. 2.

(r) 42 & 43 *Vict.* c. 49, First Schedule.

(s) And see per Lord Ellenborough in *R. v. Johnson*, 3 M. & S. 548, 549, on the old stat. 39 *Geo. III.* c. 85.

(t) Or have been at the time of the offence committed: *R. v. Lovell*, 2 M. & Rob. 236.

(u) *R. v. Cullum*, L. R. 2 C. C. R. 28.

It will be convenient to consider these three heads separately. Many of the decisions which will be mentioned took place under the old stat. 39 *Geo. III. c. 85*, and 7 & 8 *Geo. IV. c. 29*, but they may with propriety be inserted here.

1. *The prisoner must be a clerk or servant, or employed in the capacity of a clerk or servant.*

It was the opinion of all the judges that an apprentice (x), and also a female servant (y), were within the stat. 39 *Geo. III. c. 85*. And it is clear that a female servant is within the statute of *Geo. IV. (z)*, which "there can be no doubt would also be held to embrace persons employed in the capacity of clerks or servants to corporations" (a), though not appointed under the common seal (b).

Where the prisoner was a shareholder and a director of a limited company and was also appointed a servant of the company, it was held (c) that the fact of his being a director did not preclude him from also acting as a servant, and that he was rightly convicted of embezzlement as a "clerk or servant."

Where the prisoner was indicted as the servant of A. and others, and it appeared that A. & Co. were a joint-stock company, but there was no evidence of their incorporation, it was held that the prisoner was properly convicted (d).

It has been held that the clerk of a savings bank was properly described in an indictment for embezzlement under the stat. of *Geo. IV.*, as clerk to the trustees, although he was elected every year by ballot at a meeting of the managers (e). And that a clerk appointed by a station committee of four several railway companies to receive the charge for the carriage of parcels by all of them, might be described as the servant of the four companies or of the committee (f).

A clerk to a joint-stock banking company, established under 7 *Geo. IV. c. 46*, may be convicted of embezzling the money of the company, although he is a shareholder or partner in such company (g).

And it has been held that a son who, during the illness of his father, who was clerk to a local board, assisted him in his office and in the business of the board, was "employed as a clerk" to the board,

(x) *R. v. Mellish*, Russ. & Ry. 80.

(y) *R. v. Smith*, Russ. & Ry. 267.

(z) See 7 & 8 *Geo. IV. c. 28, s. 14*.

(a) Per Vaughan, J., in *Williams v. Stott*, 1 Cr. & M. 689.

(b) *R. v. Beacall*, 1 C. & P. 457.

(c) *R. v. Stuart* (1894) 1 Q. B. 310.

(d) *R. v. Frankland*, 32 L. J. M. C. 69.

(e) *R. v. Jenson*, 1 Moo. C. C. 434; and see *R. v. Hall*, 1 Moo. C. C. 474; *R. v. Callahan*, 8 C. & P. 154. As to what is sufficient evidence of acting as a trustee to support inference of legal appointment, see *R. v. Essex*, 1 Dears and B. 369.

(f) *R. v. Bayley*, 26 L. J. M. C. 4.

(g) *R. v. Atkinson*, Carr & M. 525; and see *R. v. Watts*, 2 Den. C. C. 14, ante, p. 321, where a clerk, who was also a shareholder in an insurance office, was convicted of embezzlement.

although not appointed or paid by them, and was rightly convicted of embezzlement (*h*).

The Larceny Act, 1916 (6 & 7 *Geo. V* c. 50), s. 40, sub-s. 4, in order to prevent part ownership being relied upon as a defence to an indictment for larceny or embezzlement, provides: "If any person, who is a member of any co-partnership or is one of two or more beneficial owners of any property, steals or embezzles any such property of or belonging to such co-partnership or to such beneficial owners, he shall be liable to be dealt with, tried, and punished as if he had not been or was not a member of such co-partnership or one of such beneficial owners."

Under the similar provisions in the repealed section of the Larceny Act, 1868, a member of an association, the object of which was merely the spiritual and mental improvement of its members, and not gain, was held (*i*) not to be a member of a "co-partnership."

But a prisoner was held to be rightly convicted (*k*) on an indictment under this Act charging him with having, whilst one of several beneficial owners, embezzled money belonging to the beneficial owners, it being proved that he was a member and treasurer of a trading club, which was an unregistered association of more than twenty members, and therefore had no legal existence, and that he had received money belonging to the association, and had failed to account for it.

The difficulties which the above statute was designed to remove are illustrated by the case where a committee formed of the members of two friendly societies for the purpose of conducting a railway excursion, appointed certain persons to sell the excursion tickets to the members of the societies, and the money received from the sale of the tickets was to be paid over to a specified person, and to belong to the two societies in certain proportions, and the prisoner, who was a member of the committee, was one of those nominated to sell tickets, but received no remuneration for so doing, and a certain number of tickets were given him by the committee to sell; he sold some and fraudulently appropriated the proceeds to his own use: it was held that he was not liable on an indictment for embezzlement charging him as servant to the other members of the committee (*l*).

Again it was held (*m*) that a treasurer of a friendly society (duly enrolled and certified) without salary, whose duty it was to receive moneys paid into the society and hold them to the order of the secretary, countersigned by the chairman or a trustee, and to account whenever called upon, was not a clerk or servant within 24 & 25 *Vict. c.* 96, s. 68.

(*h*) *R. v. Foulkes*, L. R. 2 C. C. R. 150.

(*i*) *R. v. Robson*, 16 Q. B. D. 137.

(*k*) *R. v. Tankard*, [1894] 1 Q. B. 548.

(*l*) *R. v. Bren*, 33 L. J. M. C. 59.

(*m*) *R. v. Tyree*, L. R. 1 C. C. R. 177.

In *R. v. Hughes* (n) it was held that a person employed by a farmer on one occasion as a drover in Smithfield to drive some cattle home to the purchaser and receive the price was a servant within the meaning of the Act of Geo. IV.

And it was held, that a person occasionally employed (o); and a person employed upon commission to travel for orders and to collect debts, although employed by many different houses on each journey, and although he paid his own expenses out of his commission, and did not live with any of his employers, nor act in any of their counting-houses (p); were servants within the stat. of Geo. III.

So, as we have seen, a person employed to carry out coals and sell them, and who was allowed a portion of the profits for his remuneration, was held, by a majority of the judges, to be a servant within the meaning of the stat. of Geo. III., although it was contended that he was a partner (q).

And the cashier and collector of a firm, who had in addition to a fixed yearly salary a percentage on the profits, but was not liable for losses of the firm, was held to be not the less on that account the servant of the firm, and liable to indictment for embezzlement (r).

And a servant, who manufactured an article from materials the property of his master for a customer, and who, having received the price, embezzled the whole of it, was held to be within the Act, although, by the agreement between him and his master, he was to have at the week's end a proportion of the price for his work (s).

A person employed by the overseers of a township as their accountant and treasurer, and who received and paid all moneys receivable or payable on their account, was held to be a clerk or servant within 39 Geo. III. c. 85 (t).

And the treasurer to the guardians of the poor of Birmingham, who was appointed under the stat. 1 & 2 Will. IV. c. lxxvii., was held to be the servant of the guardians within 7 & 8 Geo. IV. c. 29 (u).

And now the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), in order to avoid difficulties that had arisen in describing the offices of such persons, has provided by sect. 15 "that in respect of any indict-

(n) *R. v. Hughes*, 1 Moo. C. C. 370. See, however, *R. v. Hey*, 2 C. & K. 983; cited *ante*, p. 317.

(o) *R. v. Spencer*, Russ. & Ry. 299; *R. v. Winnall*, 5 Cox, C. C. 326; and see *R. v. Hughes*, 1 Moo. C. C. 370; *R. v. Metcalfe*, 1 Moo. C. C. 433; *R. v. Tongue*, 30 L. J. M. C. 49, *post*, p. 330; but see *R. v. Freeman*, 5 C. & P. 534, *contra*.

(p) *R. v. Carr*, Russ. & Ry. 198; and see *R. v. Leech*, 3 Stark. 70. In *R. v. White*, 8 C. & P. 742, the driver of a coach, who was employed by one of the proprietors, was held to be his servant; and see *R. v. Batty*, 2 Moo. C. C. 257; and *R. v. Tite*, 30 L. J. M. C. 142, where the doubt suggested by Lord Wensleydale, in *R. v. Goodbody*, 8 C. & P. 667, is cleared up.

(q) *R. v. Hartley*, Russ. & Ry. 139.

(r) *R. v. Macdonald*, 31 L. J. M. C. 67.

(s) *R. v. Hoggins*, Russ. & Ry. 145.

(t) *R. v. Squires*, Russ. & Ry. 349.

(u) *R. v. Welch*, 2 C. & K. 296.

ment or other criminal proceeding, every collector or assistant overseer appointed under the authority of any order of the Poor Law Commissioners or the Poor Law Board, shall be deemed and taken to be the servant of the inhabitants of the parish, whose money or other property he shall be charged to have embezzled or stolen."

An assistant overseer appointed by the inhabitants in vestry under 59 *Geo. III. c. 12, s. 7*, was held to be properly described as a "servant of the inhabitants of the parish" (x). This is also a correct description of an assistant overseer appointed by a parish council under sect. 5 of the Local Government Act, 1894, and money collected by him from the ratepayers is rightly laid as the property of the inhabitants (y).

And a superintendent of county police has been held to be properly described as the clerk and servant of the chief constable, appointed under 2 & 3 *Vict. c. 93 (z)*. In that case it was the superintendent's duty to receive from the constables money received by them, and return to the chief constable a statement of such moneys; and to pay the constables' wages weekly. In practice he kept accounts with the men, and set off sums received by them against their wages, the balance struck going over to next account, and so on weekly, no money passing. A constable thus accounted for £2 3s. 6d., but the superintendent fraudulently omitted that sum in his account with the chief constable, and subsequently denied its receipt. He was, nevertheless, held to have received it constructively, by the mode in which the accounts were kept, and convicted of embezzlement.

A county court bailiff appointed by the high bailiff is rightly described as a servant of the high bailiff (a).

But it has been held that the clerk of a chapelry, who was employed to collect the sacrament money from the communicants, was not the servant of the minister, churchwardens, or poor of the township, in which the chapel was situate (b). And that a schoolmaster of a charity school, no part of whose duty it was to receive subscriptions, but who, on one occasion, was requested by the treasurer to receive a sum of £15 on account of the schools, did not stand in such a relation to the treasurer or the committee, as to bring him within the Act (c).

And a person, chosen and sworn in at a court-leet held by a corporation, as chamberlain of certain commonable lands, who received no remuneration, but whose duties were to collect money from the commoners and others using the commonable lands, to employ the money so received in keeping the lands in order, to account at the end of the year to two aldermen of the corporation, and to pay over

(x) *R. v. Carpenter*, L. R. 1 C. C. R. 29.

(y) *R. v. Smallman*, [1897] 1 Q. B. 4.

(z) *R. v. Baxter*, 5 Cox, C. C. 302.

(a) *R. v. Parsons*, 16 Cox, C. C. 498; distinguishing *R. v. Glover*, 33 L. J. M. C. 169.

(b) *R. v. Burton*, 1 Moo. C. C. 237. It does not appear, from the report, who had the appointment of the clerk.

(c) *R. v. Nettleton*, 1 Moo. C. C. 259.

any balance in his hands to his successor, was held not to be a servant within the meaning of the Act of Geo. IV. (*d*). A person who is employed on terms which make him an agent rather than a servant cannot be convicted of embezzlement (*e*). But a commercial traveller has been held to be a servant (*f*).

A commission agent was paid a nominal salary of £1 a year in order to obtain the security of a guarantee society. He kept a refreshment house, and was employed by the prosecutors to get orders for their goods, collect the money, and pay it over. He was to go about among the farmers to get orders, but no definite time was to be spent in so doing, and he was styled their agent for the district. The prosecutors had a store at B. under the control of the prisoner, who supplied customers from the stores pursuant to the orders he obtained. The prisoner, having got into arrear, was treated by the prosecutors as a debtor for the amount. The prisoner fraudulently appropriated money received from customers, and gave a false account. It was held that he could not be convicted of embezzlement, as he was not the servant of the prosecutors, but rather their agent (*ff*).

Again, in a case (*g*) in which the prisoner was employed to obtain orders for the sale of iron manufactured by the prosecutors in a different county and was to receive a commission on orders obtained by him, but was to account to the prosecutors for any money he might receive, he received money for them which he fraudulently appropriated: it was held, that he could not be considered to have been the clerk or servant of the prosecutors or employed by them in that capacity, but was rather an agent. However, in a case (*h*), which occurred very soon afterwards, in which the prisoner was engaged by the prosecutor, a shirt manufacturér, as a commercial traveller, paid by commission and at liberty to receive orders for others than the prosecutor, he was held to be a servant, and not the less so that he was at liberty to obtain orders for several masters. The distinction between the two cases seems to be that a traveller is under orders to go here and there; but a commission agent may go where he likes. Whether or not the control necessary to constitute the relationship of master and servant existed, would be a question for the jury unless the agreement was in writing, in which case it must be construed by the Court (*i*).

(*d*) *Williams v. Stott*, 1 Cr. & M. 675.

(*e*) *R. v. Walker*, 27 L. J. M. C. 207; *R. v. May*, 30 L. J. M. C. 81 (for the facts in these cases, see *infra*); *R. v. Bowers*, L. R. 1 C. C. R. 41; *R. v. Marshall*, 21 L. T. (N. S.) 796; and see p. 34, *ante*.

(*f*) *R. v. Tite*, 30 L. J. M. C. 142. See *infra*.

(*ff*) *R. v. Walker*, *supra*.

(*g*) *R. v. May*, 30 L. J. M. C. 81.

(*h*) *R. v. Tite*, 30 L. J. M. C. 142.

(*i*) If the servant be engaged, or his duties defined by a written instrument, that of course must be produced, and parol evidence is not admissible to show the terms of hiring or duties unless notice to produce has been given: *R. v. Clapton*, 3 Cox, C. C. 126, where Patteson, J., said he remembered two or three unreported cases tried at Warwick, one before Coleridge, J., in which it was held that under such circumstances the agreement must be produced.

That the distinction above pointed out is the true one, is shown by the case of *R. v. Bowers* (k). The prisoner there was permitted by his employers to carry on a retail coal trade on his own account, and was employed by them, under an agreement in writing, as their agent for the sale of coals on commission. He was also to collect moneys in connection with his orders, but not to be held responsible for bad debts, and the commission not to be due till the money had been received by his employers; he was not to keep such moneys more than a week, and a month's notice on either side to be given, to terminate the agreement. He was held not to be a servant within 24 & 25 *Vict. c. 96, s. 68*, and Erle, C.J., said: "The cases have established that a clerk or servant must be under the orders of his master or employed to receive the moneys of his employer to be within the statute: but if a man be intrusted to get orders and to receive money, getting the orders when and where he chooses and getting the money when and where he chooses, he is not a clerk or servant within the statute."

Again, the prisoner was employed on the following "Terms of employment—*Re John Marshall*—1s. per ton procuration fee payable out of the first payment, 4 per cent. for collecting, and 3d. on the last payment. Collections to be paid in Friday evening before five, p.m., or Saturday before two, p.m., cash orders 1s. 6d. per ton." He was at liberty to go where he pleased to get orders, but was not bound to go out and get orders; and accordingly it was held that he was not a servant, and that the case was within *R. v. Bowers* (l).

A carrier, exclusively employed between glove-sewers and the manufacturers, has been held (m) not to be the servant of either, but a bailee.

2. *He must receive or take into his possession some chattel, money or valuable security, for or in the name or on account of his master or employer.*

The receipt of money "on account of" his master, means the receipt of money which the servant is bound to account for to his master; and a servant is not the less bound to account for money to his master merely because the persons who paid him the money knew nothing of his master (n).

But the captain of a barge who was ordered to bring it back empty from a certain place, and forbidden to take a particular cargo, but who nevertheless loaded such a cargo in the barge and received the freight which he never accounted for, was held (o) not guilty of

(k) *L. R. 1 C. C. R. 41*; approved in *R. v. Negus*, *L. R. 2 C. C. R. 34*.

(l) *R. v. Marshall*, 21 *L. T. (N. S.) 796*. The power of control is also the point on which mainly turns the question whether a person doing particular work is a servant or a contractor (see p. 238, and cases there noted).

(m) *R. v. Gibbs*, 1 *Dears. C. C. 445*.

(n) *R. v. Gale*, 2 *Q. B. D. 141*.

(o) *R. v. Cullum*, *L. R. 2 C. C. R. 28*.

embezzlement, because the money was not received by him for, or in the name of, or on account of his master. He did not profess to carry the cargo or receive the freight for his master, and the person paying the money did not know for whom he paid it, and the prisoner declared that the barge came back empty.

So, too (*p*), it was held that a gamekeeper could not be convicted of embezzling his master's rabbits, where, not being authorised to take or kill rabbits for his own use, he took and killed some wild rabbits on his master's land and converted them dishonestly to his own use by selling them.

But if a person be employed only on one occasion to receive money; if, acting at that time in the capacity of a servant, he receive money and misappropriate it, it will be embezzlement.

Thus, where (*q*) a person employed by a carrier was on one occasion directed by his employer to receive a sum of £2, which he did receive, but misappropriated, he was held rightly convicted of embezzlement.

The prisoner was secretary to a money club. By the rules he was to make out the promissory notes to be signed by members and their sureties to whom money was advanced. He was a member of the committee, whose duty it was to inquire into the sufficiency of proposed sureties. He was also to summon special meetings, and to counter-sign all cheques on the treasurer. Members paid their instalments on club nights to the stewards, who handed same over to the treasurer. In consequence of doubts of the solvency of the makers of a particular promissory note, it was, by direction of the club, handed over to the prisoner by the payee, the trustee of the club, with directions to sue upon it, or to get better security for the money advanced. The prisoner employed an attorney, sued on the note in his own name, received payment from one of the makers, appropriated the money to his own use, denied the receipt of it, and returned the note to the trustee as unpaid. It was held that the duties of the prisoner as secretary were sufficiently cognate to that of the receipt of money for the club to make his employment to receive money in this instance an employment of him as clerk or servant, and that, notwithstanding he sued in his own name to get the money, he still received it for and on account of his employers, and he was convicted of embezzlement under 7 & 8 *Geo. IV. c. 29* (*r*).

And where a servant was authorised to receive money from a particular class of customers, but received and appropriated money from others, it was held that he might be convicted of embezzlement (*s*).

(*p*) *R. v. Read*, 3 Q. B. D. 131.

(*q*) *R. v. Spencer*, Russ. & Ry. 299; and see *R. v. Hughes*, 1 Moo. C. C. 370; *R. v. Smith*, Russ. & Ry. 516, *post*, p. 331; *R. v. Stanbury*, 2 Cox, C. C. 272; *R. v. Winnall*, 5 Cox, C. C. 326.

(*r*) *R. v. Tongue*, 30 L. J. M. C. 49.

(*s*) *R. v. Williams*, 6 C. & P. 626. From that report it does not appear that the prisoner was authorised to receive money at all. But in *R. v. Hawtin*, 7 C. & P. 281, Alderson, B., puts the decision on the ground stated in the text.

And so (t) a clerk, who was employed as evening collector to a carcase butcher, in which capacity it was his duty to receive every evening from the porters employed in the business such moneys as they received from customers in the course of the day, and pay the amount over to M. (another clerk), but who was not expected in the course of his employment to receive money from customers themselves, having called on some debtors of his master, and received from them a cheque which he embezzled, was held to have received it "by virtue of his employment," within the meaning of the Act of Geo. III. And a similar decision was made in the case of a toll-collector (u), who on one occasion was ordered to receive a debt due to his employers, which he received and embezzled, "because though this was out of the ordinary course of the prisoner's employment, yet as he was servant to H. and J., and in his character of servant to them had submitted to be employed by them to receive the note and moneys, and had received them by virtue of his being so employed, the case was within the statute."

The secretary of a benefit building society, according to the certified rules, had nothing to do with the receipt of money when paid off by mortgagees, but the rules were not strictly followed and the secretary was in the habit of receiving such moneys, and on one occasion embezzled a sum so paid to him. It was held that the course of business was evidence that in addition to his duties as secretary under the rules he was employed by the trustees as their servant to receive the mortgage money, and received it by virtue of his employment, and might be convicted of embezzlement under 7 & 8 Geo. IV c. 29, s. 47 (x).

In the following case (y) it was held that a contractor's carman receiving money for the contractee could not be convicted upon an indictment which charged him with embezzling money belonging to the contractor. The prosecutor W. had contracted with the Great Northern Railway Company to find and provide them with necessary horses and carmen for the purpose of conveying and delivering to the customers of the company the coals of the company in their own waggons, and that he or his carmen should, day by day, duly account for and deliver to the company's coal-manager all moneys received from customers in payment for coals so delivered. By the contract the carmen were to obey the orders of the company's coal-manager in all

(t) *R. v. Beechey*, Russ. & Ry. 319; but see *R. v. Thorley*, 1 Moo. C. C. 343.

(u) *R. v. Smith*, Russ. & Ry. 516. But in *Crow's Case*, 1 Lew. 88 (2 Russ. on Cr. 444), which was precisely similar, Lord Wensleydale directed an acquittal, observing that he had never approved of the decision in *R. v. Smith*.

(x) *R. v. Hastie*, 32 L. J. M. C. 62. Of this case it is to be observed that, although it occurred long after 24 & 25 Vict. c. 96 came into operation, the indictment appears to have been framed on 7 & 8 Geo. IV. c. 29, probably from the thoughtless use of an obsolete printed form.

(y) *R. v. Beaumont*, Dears. C. C. 270. This case was twice argued on account of a difference of opinion among the judges.

things connected with the carrying and delivery of coal and receipt and payment of money. The delivery notes, as well as receipted invoices of the coals, were handed to W.'s carmen, and the former were taken to his office to be entered in his books; but the invoices receipted by the company were left with the customer on payment of the amount. The prisoner B. was servant of W., and was employed by him as carman in the delivery of coals pursuant to the said contract, and it was B.'s duty to pay over direct to the clerks of the company any money he might receive for such coals. B. delivered coals to one of the company's customers, and brought the delivery order to the office to be entered. He received for the coals £5 10s., leaving the receipted invoice with the customer, but converted the money to his own use. He was indicted for embezzlement as servant of W.; but it was held by a majority of the judges that he could not be convicted, as the evidence showed such a privity as to make him the agent of the company in receiving the money, and that the money was not received on account of W., but on account of the company.

However, in a subsequent and very similar case (z) a different decision was arrived at; but *R. v. Beaumont* was not cited. H. was agent of the Great Northern Railway Company at Huddersfield, for the purpose of carrying out goods to be there delivered by the company, and employed his own servants, and used his own drays and horses, and was answerable to the company for moneys collected by his servants for the carriage of goods. The prisoner T. was H.'s servant, and, as such, it was his duty to go out with a dray, to take with him goods, and a delivery-book handed to him by J. E., a clerk in the service of the company, and to deliver the goods according to the directions contained in the delivery-book, and to receive the amount of carriage therein specified as due to the company, and then to account for the sums so received with J. E. On several occasions T. took out goods for the company, and received from the consignees payments for the carriage as in the delivery-book, amounting to £6, which sums were paid to, and received by him as due to the company; and the receipts were given by T. in the name of the company. T. absconded, and never paid these sums either to J. E. or to his master H., but H. paid up the amount to the company in pursuance of his arrangement. T. was indicted for embezzlement as the servant of H., and convicted, and the conviction was upheld, as, although T. received the money "in the name" of the company, he received it "on account" of H.

If the money misappropriated has been received from the master (a),

(z) *R. v. Thorpe*, Dears. & B. 562. This case was not argued by counsel. See *R. v. Gale*, 2 Q. B. D. 141.

(a) *R. v. Hawkins*, 1 Den. C. C. 584; *R. v. Beaman*, Carr. & M. 595, where a servant, sent with 6s. to buy coals, pocketed one, and was convicted of larceny; *R. v. Goode*, Carr. & M. 582; and see *R. v. Johnson*, 21 L. J. M. C. 32; *R. v. Cooke*, L. R. 1 C. C. R. 295; *ante*, p. 311.

or if it has been in his possession (b), the servant cannot, as we have seen, be convicted of embezzling it, but should be convicted of larceny, which, as we shall hereafter see, may now be done, although the prisoner be indicted for embezzlement.

But if a tradesman, suspecting his servant's honesty, give marked money to a friend to purchase something at his shop, and the servant, instead of putting the money into the till pocket it, this offence will be embezzlement (c). If the money has been put into the till and is abstracted thence, it is larceny.

Where a servant is sent by his master to get change for a note, gets it and embezzles the change, he is not liable at common law for stealing that, but should be indicted for embezzlement, as the master never had possession of the change (d).

3. *He must fraudulently embezzle the same, or some part thereof (e).*

Embezzlement may be defined as the fraudulent retention of personal property of any kind belonging to another whilst in the course of passing to the possession of the owner. It is not sufficient, however, in support of a charge of embezzlement, to prove a mere receipt, and non-payment over of money that is a mere matter of account. A positive refusal to account must be shown. Thus, where (f) a man gave money to his servant to pay taxes, and the only evidence of embezzlement was that the collector had never received the money, it was held that the servant could not be convicted of embezzlement. So, where (g) the clerk to the proprietors of a coach, whose duty it was to receive money for passengers, &c., enter the sums in a book, and remit the money weekly to his employers, duly charged himself in his book with all sums received, but did not remit the money to his employers, as he ought to have done, it was held that he could not be convicted of embezzlement.

And it was held (h) that a clerk who had merely omitted to enter

(b) *R. v. Murray*, 1 Moo. C. C. 276, *ante*, p. 321; and see *R. v. Masters* and *R. v. Watts*, *ibid*.

(c) *R. v. Hedge*, Russ. & Ry. 160; *S. C. nom. R. v. Hedges*, 2 Leach, 1033. *R. v. Hedges* was followed in *R. v. Gill*, 1 Dears. C. C. 289.

(d) *R. v. Sullens*, 1 Moo. C. C. 129; *R. v. Thomas*, 9 C. & P. 741; *R. v. Reynolds*, 2 Cox, C. C. 170. If he steal the note it is larceny, as he only had the custody, not the possession of that: *Bass's Case*, *ante*, p. 310; *R. v. Atkinson*, 1 Leach, 302; and see *R. v. Walsh*, 4 Taunt. 258; *R. v. Goode*, Carr. & M. 582; *R. v. Smith*, 1 Carr. & K. 423; *R. v. Johnson*, 21 L. J. M. C. 32.

(e) The embezzlement need not take place whilst servant, if the receipt were whilst servant: *R. v. Lovell*, 2 M. & Rob. 236.

(f) *R. v. Smith*, Russ. & Ry. 267.

(g) *R. v. Hodgson*, 8 C. & P. 422; but see *R. v. Jackson*, 1 C. & K. 384; and *R. v. Butler*, 2 C. & K. 340, see, however, *R. v. Grove*, *post*, p. 335. In *R. v. Lister*, 26 L. J. M. C. 26, Pollock, C.B., said: "I entirely dissent from the dictum of Vaughan, B., in *R. v. Hodgson*."

(h) *R. v. Jones*, 7 C. & P. 833; and see another case against the same person, 7 C. & P. 834. Making a false entry would be evidence of embezzlement: *Re Windsor*, 34 L. J. M. C. 163.

in his book a sum of money which he had received, could not be convicted of embezzlement, as it did not appear that he had denied the receipt of it, or gave any false account respecting it.

But if he had rendered an account, in which the sums received were omitted, that would be evidence of embezzlement (*i*). And it was held by Coleridge, J. (*k*), that a baker's servant, whose duty it was, on the evening of every day to render an account of all the moneys received during the day for his master, and immediately pay over the amount, having wilfully omitted to account, might be convicted of embezzlement, as such an omission was equivalent to a denial of the receipt of the money. And where (*l*) a female servant was sent to receive rent due to her master, received the rent and went off to Ireland, it was held, by the same learned judge, that the circumstance of her quitting her place and going off to Ireland was evidence from which a jury might infer that she intended to appropriate the money, and she was found guilty.

So in a case (*m*) in which it appeared to be the duty of L., the prisoner, to receive remittances from customers for his master, to enter the amounts received in a cash-book, to furnish an extract from the cash-book to the cashier, also to enter the amount to his master's credit in a banker's book, and to pay the amount with others, from time to time into the bank, and also to enter each amount in his master's ledger to the credit of the customer who paid it. Having received a sum of money from a customer, L. did not enter it in the cash-book, or in the extract furnished to the cashier, or in the banker's book, or pay the amount into the bank for his master, but he *did* enter it in the ledger to the credit of the customer. He was nevertheless held to have been rightly convicted of embezzlement, and it was also held that the making the entry in the ledger did not exempt him from punishment.

And where an assistant overseer who collected poor-rates entered money received in a book, charging himself with it, but omitted to pay it into the bank to the overseers' account, he was held to be rightly convicted of embezzlement (*n*).

But where a servant, having received money, admitted the receipt, and promised to account, but did not do so, it was held by Erskine, J. (*o*),

(*i*) *R. v. Creed*, 1 Carr. & K. 63. See *R. v. Butler*, 2 C. & K. 340, a case where a servant had made up his account, but had never delivered it; and it was held no accounting.

(*k*) *R. v. Jackson*, 1 Carr. & K. 384. In *R. v. Wortley*, 21 L. J. M. C. 44, Lord Campbell said: "There are many authorities which show that the denial of the receipt of the money by the prisoner constituted an embezzlement."

(*l*) *R. v. Williams*, 7 C. & P. 338.

(*m*) *R. v. Lister*, 26 L. J. M. C. 26. In *R. v. Betts*, 1 Bell, C. C. 90, it was held that a miller's foreman, who had authority to sell flour and enter the sale in a book, could not be convicted of larceny of some flour which he sold without entering the sale in a book, but should have been indicted for embezzlement of the money received for it.

(*n*) *R. v. Guelder*, 30 L. J. M. C. 34.

(*o*) *R. v. Creed*, 1 Carr. & K. 63.

that he could not be convicted of embezzlement. In that case, the collector of a water company, as was his practice, gave the turncock three receipts for water rate, desiring him to receive the amounts. He received the money, and, when asked, admitted that he had done so, and said he would pay it over on Monday, but absconded.

And where (p) the master of a coal ship retained part of the freight received for carriage of coals, claiming a right to do so according to a recognised custom between owners and captains in the course of business, Cresswell, J., held that he could not be convicted of embezzlement.

In support of an indictment for embezzlement, it is, in general, necessary to prove that some specific sum has been embezzled. But in one case, that rule appears to have been relaxed (q). In that case the prisoner was cashier in a bank. His duty was to take charge of the cash, and when any payment was made into the bank, in money and paper, the course was for him to hand over the paper to a clerk, and to enter the cash received in a book, kept by himself, called the "money-book." It was also his duty at the close of each day, to see that the cash in hand agreed with the "money-book," and to strike a balance denoting the sum in cash which he had in his charge, and which ought to have been kept either in a drawer in the counter, of which he had the key, or in a box in the banking-house, of which also he had the key. One day the cash in the money-book, at the close of business, was £1,762, which was duly carried forward, and formed the first item in the next day's account. On the latter day, at the close of business, the prisoner made the balance in the money-book £1,309, which amount he ought to have in one or other of the above-named places of deposit. Upon examination, however, it was found that, instead of £1,309, the prisoner had only £345, leaving a deficiency of £964. The prisoner, who admitted that he was short about £900, was indicted for embezzling "money to a large amount, to wit, £500." The only witness against the prisoner was the partner in the bank, who discovered the delinquency, and who could not say when the money had been purloined, from what persons it had been received, what sort of money had been abstracted, or whether from the till, or upon the receipt from customers. The jury found the prisoner guilty of embezzlement to the amount charged, and, after argument and considerable doubt, eight judges, against seven, held that there was sufficient evidence to go to the jury of the prisoner having received certain moneys on a particular day, and for them to find that he embezzled the sum mentioned in the indictment. However, in a subsequent case (r), where a shopman was indicted for embezzlement,

(p) *R. v. Norman*, Carr. & M. 501.

(q) *R. v. Grove*, 7 C. & P. 635.

(r) *R. v. Jones*, 8 C. & P. 288. Of this case it may be remarked that Alderson, B., was one of the seven dissentient judges in *R. v. Grove*, and in *Grove's Case* there was an admission, which in this case there was not.

and the counsel for the prosecution offered to prove that there was a deficiency in the prisoner's accounts, but said that there was no proof of the embezzlement of any particular sum, and cited *R. v. Grove*, Alderson, B., directed an acquittal, saying, that "Whatever difference of opinion there might be in the case of *R. v. Grove*, that proceeded more upon the peculiar facts of that case than upon the law. It is not sufficient to prove, at the trial, a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen."

And again, in a case (s) where it was the duty of a clerk and traveller to receive money for his employer, pay wages out of it, and make entries of all moneys received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he, from time to time, paid over balances to his employer, the clerk, having entries in the first book amounting to £25, entered them in the second as £35, and two months afterwards, in accounting with his master, made his balance £10 too little by these means, and paid it over accordingly. On this evidence he was indicted for embezzling the £10, but Williams, J., asked the counsel for the prosecution, "Can you show any precise sum received by the prisoner, on account of his master, and the whole or part of that very sum appropriated by him to his own use?" and in the absence of such evidence directed an acquittal.

However, in the following case (t), Erle, C.J., allowed a prisoner to be convicted without such specific proof. L. was indicted for embezzling the sum of £270, part of a sum of £2,783 7s. 9d., which he had received on account of the Receiver-General to Her Majesty's Customs. L. was assistant teller to the Customs. It was his duty to receive money from merchants and others who had to pay money to the Receiver-General and enter such receipts in a cash-book. He had also, in the course of his employment, to make certain payments and enter them on the other side of the same book, and balance the amounts each day, paying over so much of the surplus as was in notes to a superior officer and retaining the cash, which was carried to the next day's account. When he paid over the notes it was his duty to give the same officer a memorandum of the receipts and disbursements of the day. One day he was ordered, about eleven o'clock, to make up his accounts, but continued to receive money until two, when he left the office and did not return. His desks and books were then examined, and in the latter were found, entered as received, several sums, amounting to £2,783 7s. 9d.; and on the other side payments, amounting to £130 13s. 3d. The balance found, which ought to have

(s) *R. v. Chapman*, 1 C. & K. 119; *R. v. Welch*, 2 C. & K. 296.

(t) *R. v. Lambert*, 2 Cox, C. C. 309; and see *R. v. Moah*, Dears. C. C. 626.

been £2,652 14s. 6d., was £270 short. The whole of the money was received between ten and two o'clock on that day. On the part of the prisoner it was contended, that he could not be convicted of embezzlement as there was no evidence showing the appropriation of any particular sum received from any one person. But Erle, C.J., said: "I think the offence is sufficiently made out within the meaning of the statute (*u*), if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself, and that he absconded, or refused, when called upon, to account, leaving a portion of the gross sum deficient. There would be a constant failure of justice if I were to decide otherwise, since it is impossible, in cases like the present, where a number of different amounts of money have been received, to specify which sum or sums, or the parts of which sum or sums, have been embezzled."

And it has been held to be embezzlement in the secretary of a society fraudulently to withhold money received from a member to be paid over to the trustees; and that he might be stated to be the clerk and servant of the trustees, and the money might be stated to be their property, though the society was not enrolled, and though the money ought, in the ordinary course, to have been received by a steward (*x*). However, in another case, where a society, in consequence of administering to its members an unlawful oath, was an unlawful combination and confederacy under the stats. 39 *Geo. III. c. 79* and 57 *Geo. III. c. 19, s. 25*, it was held that a person charged with embezzlement as clerk and servant to such society could not be convicted (*y*).

A receipt or any other unstamped instrument which from not being duly stamped is inadmissible as evidence in civil proceedings, is nevertheless available as evidence in criminal proceedings (*z*).

Indictment.

By the Larceny Act, 1916 (6 & 7 *Geo. V. c. 50*), s. 33, sub-s. 1, it is enacted that: "Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour)."

By the Larceny Act, 1916 (6 & 7 *Geo. V. c. 50*), s. 40, sub-s. 2: "An allegation in an indictment that money or bank notes have been em-

(*u*) It does not appear from the report whether L. was indicted under 7 & 8 *Geo. IV.* or 2 *Will. IV. c. 4*; but most probably the latter.

(*x*) *R. v. Hall*, 1 *Moo. C. C. 474*. And before trade unions were legalised it was held that the servant of a trade union might be convicted of embezzling the funds of the society, although some of its rules were void as being in restraint of trade, *R. v. Stainer*, L. R. 1 *C. C. R. 230*; *R. v. Tankard*, [1894] 1 *Q. B. 548*, *ante*, p. 325.

(*y*) *R. v. Hunt*, 8 *C. & P. 642*.

(*z*) Stamp Act, 1891 (54 & 55 *Vict. c. 39*), s. 14 (4).

bezzled or obtained by false pretences can, so far as regards the description of the property, be sustained by proof that the offender embezzled or obtained any piece of coin or any bank note or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to any person and such part has been returned accordingly " (a).

By the Indictments Act, 1915 (5 & 6 Geo. V. c. 90), First Schedule, rule 3: " Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character."

By the Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 44, sub-s. 2: " If on the trial of any indictment for any offence against section 17 of this Act (relating to embezzlement) it is proved that the defendant stole the property in question, the jury may find him guilty of stealing, and thereupon he shall be liable to be punished accordingly; and on the trial of any indictment for stealing the jury may in like manner find the defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be, and thereupon he shall be liable to be punished accordingly " (b).

Venue.

By the Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 39, sub-s. 1: " A person charged with any offence against this Act may be proceeded against, indicted, tried, and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be deemed to have been committed in that county or place " (c).

Offences in Special Trades.

Other Acts of Parliament have also at various times been passed for the protection of masters in particular trades from frauds and embezzlements of property by their servants. In this place, however, it is unnecessary to do more than refer to the following of those Acts: The Frauds by Workmen Act, 1748 (22 Geo. II. c. 27) (d), the Frauds by

(a) Where the prisoner received a cheque and there was no evidence that it had been converted into money, it was held that he could not be convicted of embezzling money: *R. v. Keena*, L. R. 1 C. C. R. 113.

(b) The restitution clause, s. 45, applies to property embezzled.

(c) *R. v. Treadgold*, 48 L. J. M. C. 102 illustrates the difficulties as to venue in a prosecution for embezzlement before the above enactment. Compare *R. v. Rogers*, 3 Q. B. D. 28.

(d) See Chitty's Statutes. Title "Master and Servant."

Workmen Act, 1777 (17 *Gco. III. c. 56*) (*e*), and the Hosiery Act, 1843 (6 & 7 *Vict. c. 40*) (*f*).

Suing Servant after Conviction.

When a servant who has robbed his master has been prosecuted and tried for the offence, the master may, if he thinks proper, sue him in trespass for the damages he has sustained thereby. But until the servant has been convicted, the master may find himself hindered in suing by the ancient principle of law that where a civil claim is founded upon a matter which might be the subject of an indictment for felony, the person seeking to enforce it should prosecute for the criminal offence before he can recover in the civil action (*g*). It would not prejudice the civil remedy that the offender was acquitted of the crime, if he was tried (*h*). And it would seem that if the servant die before conviction the master might maintain an action against the servant's executors (*i*).

If the servant abscond with the stolen property or money to a foreign country, it would seem to be no answer to an action in that country to recover the property or money, that by the law of England a prosecution for felony must precede an action to recover the proceeds of it (*k*). But the decision of the question would depend on the *lex fori* or law of the country in which the action is brought.

Where a servant robbed his master of money and before conviction deposited deeds, &c., as security for the amount stolen, and the master afterwards prosecuted to conviction, it was held by the Court of Chancery that the money taken was a good consideration for the security (*l*).

If a warrant of attorney is given to his master by a servant charged with embezzlement upon a distinct agreement by the master not to prosecute the charge, the agreement is illegal, and the Court would upon a summary application set aside the warrant of attorney (*m*). But where

(*e*) See Chitty's Statutes. Title "Master and Servant."

(*f*) See *ibid.* Title "Criminal Law."

(*g*) See *Wells v. Abrahams*, L. R. 7 Q. B. 544; *Appleby v. Franklin*, 17 Q. B. D. 93, and *ante*, p. 99. If any person misapplies the property of a friendly society, he may, on summary conviction, be fined and ordered to repay the money applied improperly, and in default he may be imprisoned: Friendly Societies Act, 1896 (59 & 60 *Vict. c. 25*), s. 87, sub-s. 3. An order under this section to repay such money, followed by imprisonment in default of paying, is a bar to a subsequent action by the society for the recovery of such money: *Vernon v. Watson*, [1891] 2 Q. B. 288.

(*h*) *Crosby v. Leng*, 12 *East*, 409; *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 1 B. N. C. 198; *White v. Spettigue*, 13 M. & W. 603.

(*i*) *Wickham v. Gattrell*, 23 L. J. Ch. 783.

(*k*) *Scott v. Lord Seymour*, 31 L. J. Ex. 457.

(*l*) *Chowne v. Baylis*, 31 L. J. Ch. 757. And see *Dudley and West Bromwich Bank v. Spittle*, 1 John. & H. 14.

(*m*) *Ex parte Critchley*, 3 D. & L. 527; *Whitmore v. Farley*, 43 L. T. Rep. 192; and see *Collins v. Blantern*, 1 Smith's L. C. 369; *Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371.

a warrant of attorney was obtained from a servant upon a threat by his master that, if he did not go to his attorney and give satisfactory security for an amount which he ought to have accounted for, he would prosecute him for unlawfully making use of his money, the Court of Common Pleas refused to set it aside as there did not appear to have been any agreement not to prosecute. "Such an agreement," said Coltman, J., "is not to be inferred from hasty expressions used by a man when seeking to obtain security for a just debt" (n).

If the Court should come to the conclusion that there was an implied term or condition not to prosecute, an agreement containing such a term would be founded on illegal consideration and void. The secretary of a building society was found to be a defaulter in his accounts and was threatened with a prosecution for embezzlement. Two of his relatives, upon his application for help, gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for that amount, and they also gave the society, as collateral security, two promissory notes and some title deeds. In doing this they were actuated by the desire to prevent the prosecution, and that was known to the directors of the society; but no promise was made not to prosecute. The Court, however, held that such a term was implied in the agreement, which was therefore void, as founded on an illegal consideration (o).

Falsification of Accounts.

By the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), after reciting that it is expedient to amend the law so as to punish the falsification (p) by clerks, officers, servants, and others of their employers' accounts, books, writings, or documents, it is enacted—

"1. That, if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years.

(n) *Ward v. Lloyd*, 6 M. & G. 785.

(o) *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173.

(p) Some acts of falsifying accounts may also amount to forgery at common law or under the Forgery Act, 1913 (3 & 4 Geo. V. c. 27): *Re Arton* (No. 2), [1896] 1 Q. B. 509.

"2. It shall be sufficient in any indictment under this Act to allege a general intent to defraud, without naming any particular person intended to be defrauded.

"3. This Act shall be read as one with 24 & 25 *Vict. c. 96*."

Under sect. 1, it has been held that a rate-collector who presented his account, which correctly showed a certain sum due from him as "balance in hand," could not be convicted of making a "false entry" in his account on proof that, as a matter of fact, he had not got the money in his possession (*q*).

In an indictment of a prisoner for making a false entry in "any document or account," it is essential that the document or account in question should be one "which belongs to or is in the possession of his employer or has been received by him for or on behalf of his employer," as in the earlier part of the section (*r*).

The prisoner was a clerk employed by a London firm at their shop in Paris. It was his daily duty, on receiving money for his employers, to enter the amount on a slip, and to send the slip to his employers in London. The amount named on the slip was then, as he knew, entered in a cash book in London. Having fraudulently omitted to enter on slips sent by him to London certain sums received by him in Paris, intending that, as in fact happened, they should be omitted from the cash book in London, he was held to have been rightly convicted of "concurring in omitting material particulars" from the cash book (*s*).

To falsify any of the various mechanical means now in use for counting money and calculating sums received or paid, whereby an account is brought into existence, may be a falsification of accounts within the meaning of the above statute. So where a taxicab driver in the employ of a motor cab company drove certain passengers and received from them certain fares, but wilfully and with intent to defraud drove the cab with the flag up so that the taximeter registered nothing, it was held that he was properly convicted of falsifying an account within the above Act (*t*).

(*q*) *R. v. Williams*, 79 L. T. 739.

(*r*) *R. v. Palin*, [1906] 1 K. B. 7.

(*s*) *R. v. Oliphant*, [1905] 2 K. B. 67.

(*t*) *R. v. Solomons*, [1909] 2 K. B. 980.

CHAPTER IX.

TESTAMENTARY PROVISIONS RELATING TO SERVANTS.

It is thought convenient to collect into a separate chapter the various decisions upon this subject, as the answer to the question, whether particular individuals are entitled to legacies left to a class of persons as "servants" (a), rather depends upon the words of the will and the intention of the testator in each case, than upon the strict legal construction of the contract into which he has entered with the persons claiming the legacy. For it by no means follows that every person with whom a testator had entered into a contract of hiring and service, was an object of his testamentary bounty; although, in many cases, a clue to his intention may be found by ascertaining the exact nature of such contracts. For similar reasons no rule can be laid down which will be applicable to all cases. Each case must depend upon its own particular circumstances. It is, however, of course, necessary that a person claiming to be entitled to a legacy left to each one of a class of persons, should be one of that class to whom the legacy is left—that a person claiming a legacy as a servant should be a servant—otherwise he cannot be entitled to it. It has, therefore, been held that a person who was not obliged to give up his whole time to his master, although in some sense he might be called a servant, was yet not entitled to a legacy left to servants.

Thus, where (b) the Duke of Bolton by his will devised "unto such of my servants as shall be living with me at the time of my death one year's wages;" the Lord. Keeper said: "Stewards of courts, and such who are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will, but I will not narrow it to such servants only that lived in the testator's house or had diet from him."

Upon similar principles it has been held that a servant to be entitled to a legacy left to "servants," must not be subject to the orders of any other person than the testator; that is, that a person serving the

(a) In *Pickwell v. Spencer*, L. R. 7 Ex. 105, a devise to A., with a direction to pay B. £5 a year wages as long as he shall continue to labour on the farm, was held to give A. the fee. In *Jenner v. Turner*, 16 Ch. D. 188, a condition in a will in restraint of marriage with a domestic servant was held good. As to the effect of a promise to make a will in favour of a servant, see *Maddison v. Alderson*, 8 App. Ca. 467.

(b) *Townshend v. Windham*, 2 Vern. 546. But see *Re Lawson; Wardley v. Bringlee*, [1914] 1 Ch. 682.

testator under a contract made by the testator with that person's master, does not come within the class of persons contemplated by the will, although the testator might in some sense be considered his *dominus pro tempore*.

Thus where (c) a testator, after bequeathing legacies to two of his servants by name, if in his service at the time of his decease, gave and bequeathed unto all his "other servants" who should be living with him at the time of his decease £50 each, and £10 each for mourning; and by a codicil revoked the legacies of £50 and £10 for mourning to his other servants not particularly named, and made the following bequest: "To all my other servants in lieu thereof the sum of £500 each, and £20 each for mourning:" Sir W. Grant, M.R., held that a coachman supplied, in the course of business, with a carriage and horses hired by the year from a job-master, was not entitled to the legacy as a servant within the intent and meaning of the will. The coachman, in that case, did not board or lodge in the testator's house, but received from him 12s. a week as board wages, and a livery with the other male servants, the job-master also paying him 9s. a week; but the coachman served no other person than the testator, and was returned by him as his coachman under the Act imposing a duty on male servants. However, Sir W. Grant observed, truly, that the coachman was merely the subject of the contract, which was with the job-master, not a party to it.

But that case was distinguished by Sir J. Nicholl in *Howard v. Wilson* (d). There a coachman, a married man, originally hired by, and who had lived five years with a testatrix, residing over her stables in town, occasionally accompanying her into the country, where he lived in the house, though, like all her servants, on board wages, waiting sometimes at table, and remaining with her though she changed her job-master, was held entitled under a bequest "to each of my servants living with me at the time of my death £10;" although the testatrix paid a job-master £200 a year, out of which he paid the coachman wages and board wages (except 3s. a week extra in the country), and found him in liveries.

The late Earl of Leicester by his will (e) gave "one year's wages in advance to each of my servants in my service at my death, who shall have lived with me five years or upwards, and one-half of a year's wages to each of my other servants in my service at my death; the said several legacies to my said servants to be in addition to whatever sum may be due to them respectively for wages up to my death; and also an additional sum of £10 to each of my upper servants and of £5 to each of my under-servants respectively for mourning. And I

(c) *Chilcot v. Bromley*, 12 Ves. 114; see *Quarman v. Burnett*, 6 M. & W. 499, ante, p. 236.

(d) 4 Hagg. 107.

(e) *Bulling v. Ellice*, 9 Jur. 936.

direct that each of the said legacies expressly given for mourning, and each of the said legacies to my said servants shall be paid within one calendar month next after my death."

Knight Bruce, V.-C., held that a farm bailiff, who had lived with the Earl twenty-eight years, at £350 a year, living on the home farm within the park, rent free, the Earl paying all rates and taxes, and who was allowed keep for a cow and a horse, and to take pupils to instruct in agriculture, was a servant within the meaning of the will, and was entitled to his year's wages of £350 and interest at four per cent. from one month from the testator's decease, the time when the legacy was directed by the will to be paid.

The testator gave one year's wages "to each of my servants who shall have been in my service for three years prior to my death." He had a small estate which he farmed himself. For the purpose of farming he employed six labourers at the usual farm labourers' wages. It was held by Sargant, J., that these six persons were not entitled to take under the will. "The testator was referring to persons who ministered in some way to his personal comfort or his wants—persons of the class of domestic servants, though not necessarily only those employed in the house" (f).

A bequest to each "servant in my domestic establishment" was held (g) by Lord Truro not to cover the case of a head gardener at weekly wages living in a cottage belonging to the testator in an adjoining village, on the ground that the testator had in view the distinction between indoor and outdoor servants when he used the term "servants in my domestic establishment."

But a legacy of one year's wages "to each of my domestic servants who shall have been in my service for two years prior to my death" was held to include a certified male nurse and masseur who had been in daily attendance on the testator for a period of twelve hours, but did not generally sleep in the house, and who was engaged by a receiver of the testator's property appointed under sect. 116 of the Lunacy Act, 1890 (h). On the other hand, servants appointed by the committee of the person of the testator on the latter's removal to an establishment maintained for him under the authority of the Master in Lunacy were not persons in the testator's service at his death. They were either in the service of the committee of the person or of the Court (i).

Moreover, to entitle a servant to a legacy of a year's wages it has been held that he must have been a yearly servant, and a servant who has been paid weekly wages is not entitled. Thus, where a will contained the following words, "I give to each of my servants one

(f) *In re Forrest, Bubb v. Newcomb*, [1916] 2 Ch. 386.

(g) *Ogle v. Morgan*, 1 D. M. & G. 359; *Vaughan v. Booth*, 16 Jur. 808.

(h) *Re Lawson; Wardley v. Bringlee*, [1914] 1 Ch. 682.

(i) *Re King, Jackson v. Attorney-General*, [1917] 2 Ch. 420.

year's wages over and above what may be due to them at the time of my decease," a question was made whether a person who had worked in the testator's garden, under his gardener, for several years, at weekly wages, and a boy who had served the testator for some time as a cowboy, at weekly wages, and neither of whom resided with or formed part of the testator's family, were to be considered as entitled under the will to a year's wages; but Sir J. Leach, M.R., was of opinion that these persons were not servants in the sense in which the testator had used the expression. In speaking of a year's wages the testator plainly used that expression with reference to family servants usually hired by the year (*k*).

And so where (*l*) a testator by his will gave to each of his servants living with him at his decease, and who had lived with him three years, a legacy of one year's wages, Sir G. Turner, V.-C., held, that a head-gardener who at the time of the death of the testator lived in a cottage of the testator in the grounds, free of rent, and was employed at 17s. a week, was not entitled to the legacy; as although clearly a servant, and not to be excluded on the ground that he was not living in the same house with the testator, yet the bequest only applied to servants hired by the year.

However, where (*m*) a testator, among other pecuniary legacies, gave to his executors the sum of £1,000 to be equally divided between all the servants in his service at the time of his decease (except as in his will mentioned), it was held by Sir J. Romilly, M.R., that a head gardener and under-gardener at weekly wages, who lived at their own houses, adjacent to that of the testator, and were occupied in their employment of gardeners the whole of the working days, and occasionally on Sundays, to feed the cattle and attend to the garden, and had no employment from any other person during their engagement with the testator, were servants within the meaning of the will.

The servant also must, generally speaking, continue in the service of the testator to the time of his death.

Sir Robert Henley, by will (*n*), gave £100 apiece to all his servants. The Court declared that none but such as were his servants before the making of the will (*o*), and did so continue to be servants to him until the time of his death, could have any pretence to the legacy:

(*k*) *Booth v. Dean*, 1 Myl. & K. 560. But see *Thrupp v. Collett*, *infra*.

(*l*) *Blackwell v. Pennant*, 9 Hare, 551; followed in *Re Ravensworth*; *Ravensworth v. Tindale*, [1905] 2 Ch. 1.

(*m*) *Thrupp v. Collett*, 26 Beav. 147.

(*n*) *Jones v. Henley*, 2 Chanc. Rep. 361. In *Re Marcus*, 56 L. J. Ch. 830, North, J., said he thought there must have been something more than appears in the report of *Jones v. Henley*, which led the judge to come to the conclusion he did in that case.

(*o*) The question does not appear to have been raised in any subsequent cases, whether it was necessary that the servant should have been in the service of the testator at the date of his will, as well as at the time of his death. See *Parker v. Marchant*, *infra*.

and such only as were his menial servants, and lived all along in the house with him from the date of the will until his death, and no others.

But where (p) a testator bequeathed a legacy to Jane H., "if in his service at the time of his decease," and it appeared that Jane H. had quitted his house a few days before his death, Lord Eldon held, that parol evidence was admissible to show that though she had quitted his house, she continued and was considered by him as still in his service: and upon that evidence the legacy was established.

And in a subsequent case (q), where a testator had several servants, and by a codicil to his will bequeathed to some of them by name legacies of £1,000 each, and then gave "to the other servants £500 each;" it was held by Lord Lyndhurst, L.C. (affirming the decision of Knight Bruce, V.-C.), that A. R., a female servant who was in the testator's service at the date of the codicil, though for ten weeks only, and quitted it three years and a half before his death, was entitled to a legacy of £500, considering that the case of *Jones v. Henley* (r) did not apply. And his Lordship said: "The testator had several servants, some of whom had lived in his service for many years, as he states in his codicil. The others lived with him for a shorter period of time. He distinguishes between them. He gives to three of them by name, who had lived in his service for many years, £1,000 each, and he then expresses himself thus, 'to the other servants £500 each.' What is meant by the other servants? The rest. After taking out of the whole class the three individuals who are named, Mrs. D. and the two others, to whom he gives £1,000 each, he then gives £500 to the remainder. It appears to me as if he had named them, and as he annexes no condition to the gift, I am of opinion that A. R. is entitled, on the construction of this codicil, to the legacy of £500."

Under a bequest, by which the testator directed that "my office and warehouse employés, such as clerks and workmen, shall have to receive six months' full salary," it was held (s) that the persons to take were the employés in the service of the testator at the time of his death.

But where a testator directed his trustees "to pay to each man who shall have been in my employ over ten years the sum of £10 for each year's service beyond the said ten years," it was held (t) that a man who had been in the testator's employment for fifteen years,

(p) *Herbert v. Reid*, 16 Ves. 481; followed in *Re Cole*; *Cole v. Cole*, [1919] 1 Ch. 218.

(q) *Parker v. Marchant*, 6 Jur. 292; 7 Jur. 457 (the point in the text is not noticed in the report, 2 Cr. & Ph.).

(r) *Ante*, p. 345.

(s) *Re Marcus*, 56 L. J. Ch. 830.

(t) *Re Sharland, Kemp v. Rozey*, [1896] 1 Ch. 517.

but had left his employment before the date of the will, and was not in his employment at the time of his death, was entitled to a legacy of £50.

Even a servant wrongfully discharged is not entitled to a legacy left by a will, which requires that the legatee shall be "in the service" to be entitled to it. And therefore, where a man left his landed estate to his son and charged it with the payment to his faithful servant S., of an annuity of £12 "provided she shall be in my service at the time of my decease;" and two days before his death discharged her without sufficient ground, paying her wages; it was held by the Exchequer Chamber that although she might perhaps recover damages in an action for wrongful discharge, yet she was not in the service of the testator at the time of his decease, and therefore not entitled to the annuity (u).

And a similar decision was made where a servant voluntarily left the house of a lunatic master during his lifetime, receiving wages up to the end of his year, 16th October, though the testator died on the 8th October (x).

By his will dated November, 1876, B., a testator who died in July, 1883, bequeathed "to each of my servants who shall at my death have been in my service twelve calendar months or longer, one year's wages in addition to anything owing by me, and to my gardener, P. G., £300 in addition." In August, 1880, P. G., who had been in testator's service thirty-three years, left the service, and on leaving the testator made him a present of £100. It was held by Kay, J., that as P. G. was not in the service at the death of the testator, he had not fulfilled the condition, and was not entitled to the £300 (y).

When a legacy is left by a master to his servant, it will, sometimes, be considered as a satisfaction, either in the whole or in part, of any wages due at the time of the master's death, unless a contrary intention appear from the master's will (z). Courts of equity, however, are inclined to infer a contrary intention from slight circumstances. Thus, in *Mathews v. Mathews* (a), Sir Thomas Clarke, M.R., said he remembered a case, before Lord Hardwicke, where an old lady, indebted to a servant for wages, by will gave ten times as much as she owed or was likely to owe; yet because the legacy was made payable a month after her own death, the Court laid hold of that circumstance to take it out of the general rule.

(u) *Darlow v. Edwards*, 1 H. & C. 547.

(x) *Re Serres' Estate, Venes v. Marriott*, 31 L. J. Ch. 519. In *Re Hartley's Trusts*, 47 L. J. Ch. 610, a servant was held not entitled to a legacy left to those in the service of the testatrix, because she had been dismissed in consequence of an order in lunacy by which the Court, shortly before the death of the testatrix, had ordered all her property to be sold so that her establishment had been necessarily broken up.

(y) *Re Benyon, Benyon v. Grieve*, 53 L. J. Ch. 1165.

(z) *Le Sage v. Coussmaker*, 1 Esp. 188.

(a) 2 Ves. sen. 636; see also *Chancey's Case*, 1 P. Wms. 408; *Richardson v. Greese*, 3 Atk. 69; *Smith v. Smith*, 31 L. J. Ch. 91.

Germane to the subject we have been treating of, and therefore proper to be introduced in this place, are the cases in which the question has arisen whether a direction or injunction in a will to employ a particular steward or agent imposes on the devisee an obligation in the nature of a trust in favour of the person so named (*b*). This question arose in the case of *Shaw v. Lawless* (*c*). There the testator declared it to be his "particular desire" that his executors, whilst acting in the management of all or any of his affairs under his will, as also his friend Shaw, when he should enter into the receipt of the rents of his estates, should continue Lawless in the receipt and management thereof, and likewise should employ and retain him in the receipt, agency and management of lands to be purchased and settled in pursuance of the will at the usual fees allowed to agents, he having acted for the testator since he became possessed of the estates fully to his satisfaction. Soon after the testator's decease, Shaw dismissed Lawless from his office as land agent, but without impeaching his character or capacity, Lawless filed a bill in Chancery against Shaw, claiming to be reinstated, which was dismissed by Lord Plunket, and his decree (though upon a rehearing reversed by his successor, Lord St. Leonards) was afterwards affirmed in the House of Lords. In delivering judgment in the House of Lords, Lord Cottenham, C., after stating that all cases upon a subject like this must depend upon the testator's intention, and that Lawless was only agent to the testator in his lifetime during his pleasure, and that by the terms of the will the testator desired he should continue in the agency, and that the natural presumption was that the testator wished him to continue upon the same terms, and showing to what absurd consequences the upholding Lawless's claim would lead, said: "There is, it is true, a great variety of cases in which the expression of a wish has been held to create a trust; but the rule of construction in these cases is that there should be certainty in the object and in the subject of a trust so created; that the expressions in the will should not leave the matter in a doubtful ambiguity. *Cary v. Cary* (*d*) has been referred to. There Lord Redesdale expressed the rule in these words: 'When a testator, having in his power to dispose of property, expresses a desire as to the disposition of the property, and the objects to which he refers are certain, the desire so expressed amounts to a command, and if he shows his desire, he in fact expresses his intention, provided the objects to which he refers are so defined that a Court can act upon the desire so expressed.' In *Foley v. Parry* (*e*) the Court held that a desire that a devisee in remainder should be educated and

(*b*) See generally on this subject, *Knight v. Knight*, 3 Beav. 148; *Green v. Marsden*, 1 Drew, 646. In *Thorncroft v. Lashmar*, 81 L. J. P. M. & A. 150, an appointment by letter of an agent and collector was held not testamentary.

(*c*) 5 Cl. & F. 129.

(*d*) 2 Sch. & Lef. 173.

(*e*) 5 Sim. 138, affirmed on appeal, 2 M. & K. 138.

maintained from the income of the devised property created a trust in his favour. There everything concurred to show that such was the intention of the testator. In *Hibbert v. Hibbert* (f) a trust was held to be created as to a West Indian estate, and H., the person in whose favour the desire was made, was appointed consignee. But there the words were clear and express in his favour, though the estate to which they applied appeared doubtful. In *Tibbits v. Tibbits* (g) there was no doubt as to the subject-matter, but still that case carried the doctrine of creation of trusts further than any which had preceded it, though, as it seems to me, not so far as the decree (of Lord St. Leonards) in the present case has carried it. It is true that all the Court requires is that the subject and object shall be defined and certain. Then what is the subject in the present case? It is the right to be employed in the receipt of the rents, and the agency and management, of the land of another person upon the usual fees. What is the necessary effect of this alleged right? It goes to exclude Shaw from the management of his own estate, or from the receipt of the rents themselves. Then this question arises: Suppose that he parts with the estate, would it, in the hands of a purchaser, be subject to the same liability to this claim of agency on the part of Lawless? Was it the desire or the wish of the testator that it should be so? or did he merely wish that his devisee should employ a man whose conduct had given satisfaction to himself? Some cases of difficulties of another kind were put in the course of the argument. It was asked, among other things, whether, if a testator should say that he desired his son to be educated at a particular school, that would create a trust in favour of the schoolmaster? That would certainly be a matter for the advantage of the schoolmaster, but it could not be contended that he would have a right to enforce the performance of this desire of the testator. It would be an expression of desire made for the benefit, not of the schoolmaster, but of the scholar. . . . Having examined all the cases and quite satisfied myself that there is not a case which comes at all near the present—I mean, indeed, that all are against the construction contended for by the respondent—I am of opinion that the judgment pronounced by Lord Plunket was correct, and that the decree of Lord Chancellor Sugden must so far be reversed.”

In a previous case (h) in which a testator devised his estates to trustees upon trust to let the same, and apply the rents in paying off certain incumbrances, and appointed A. to be auditor of the accounts during the execution of the trusts, and directed the trustees to pay him the usual annual remuneration; Sir L. Shadwell, V.-C., held that the trustees were not justified in removing A. from the office, there

(f) 3 Mer. 681.

(g) 19 Ves. 656.

(h) *Williams v. Corbet*, 8 Sim. 349.

being no imputation on his conduct, for that he had as much right to be auditor as any one of the devisees had to the estates.

Where a testator (i), after leaving some legacies, proceeded thus: "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts," Lord Langdale, M.R., thought he could not be understood to have intended to create an imperative trust.

(i) *Knight v. Knight*, 3 Beav. 148.

INDEX.

** * The figures refer to the pages.*

“ ABSENCE THROUGH ILLNESS.”

expression includes convalescence, 84n

ABSENCE WITHOUT LEAVE,

as justification for discharge of servant, 74—75, 77, 80
whether wages forfeited, 32n

ACCESSORY

to felony, master as, 198, 199

ACCOUNTING TO MASTER,

servant's duty as to, 70

ADMISSION

by agent or servant, when admissible against principal, 186—7
of liability upon servant's contract, 177

AGENT,

admission by, 186—7
breach of warranty of authority by, 5, 258—9
contract of, in own name, may bind principal, 188
 liability on, 174, 256
 signed by, whether personally bound, 256—8
contract of service signed by, 22
criminal act done through, 266n
for ordering goods, 178n, 180, 189n, 193, 194
for sale, 183—4
general and particular, distinguished, 189—190
illegal act of, principal's liability, 200—1
money paid by mistake to, 264—5
money wrongfully obtained by, recoverable, 263
partner as, 8
payment to, 181
or servant, whether relationship is, 34, 328—9
servant presumed, 180, 185
undertaking by, liability on, 257
wife as husband's, 3, 4
woman with whom cohabiting as, 4n

APPRENTICE,

chastisement of, 72—3
discharge of, for misconduct, 85
dispute with master, summary determination of, 72, 131

APPRENTICE—*continued.*

- earnings of, action by master for, 92
- failure to instruct, action for, 72
- induced to leave master, liability, 67—8, 78, 86
- medical attendance on, master's duty as to providing, 139
- by Poor Law authority, 23
- premium, when returnable on master's death, 131
- or servant, whether relationship is, 31
- settlement by hiring and service, 2n
- to chimney sweeping, 23
 - horse trainer, custom, 29
 - sea service, 23

APPRENTICESHIP CONTRACT,

- bankruptcy of master, effect on, 125n
- breach of, remedy for, 71
- corporation as party to, 14
- death of apprentice, effect on, 136
 - master, effect on, 130
- enforcement of, 111
- execution of, 22—3
- inducing breach of, action for, 170—1
- infant, when bound by, 5—7
 - consent of, necessary, 6
- partnership dissolution, effect on, 130
- rescission of, by magistrate, 131
- Stamp Duty, exemption, 23

ARBITRATION,

- reference to, of disputes under contract of employment, 115

ARREST

- at servant's instance, master's responsibility, 223—4

ARTICLED CLERK,

- whether premium recoverable on principal's death, 131

ASSAULT

- by servant, master's liability, 210n, 225, 229
- on servant, action by master for, 98
- by steward at public meeting, 250
- medical examination as, action by servant for, 72n

ASSIGNEE

- when restrictive covenant enforceable by, 57

ASSIGNMENT

- of contract of service, 1
 - with author, 1

AUTHOR,

- rights of, in work, 94—96

BAILEE,

- liability of, for loss of property, 244—5
- or servant, whether relationship is, 34

BANK,

- act of servant, when bound by, 179n, 196
- loss of property in custody of, liability for, 244
- setting up *jus tertii* as against customer, 70

BANKRUPTCY

- of master, effect on contract of apprenticeship, 125n
 - service, 125
 - on right to bring action for seduction, 101
- of servant, claim for wrongful dismissal passes to trustee, 113
 - unexecuted contract of service does not vest in trustee, 1
 - right to sue for personal earnings, 113
- preferential payment of wages, 126

BOARD WAGES,

- whether due on termination of service, 38n

BOARDING-HOUSE KEEPER,

- liability for loss of guest's property, 245

BORROWING MONEY,

- servant's authority as to, 187, 195

BREACH OF CONTRACT,

- action for procuring, 86—88, 168—172, 279
- malice as factor in inducing, 87—88
- of apprenticeship, remedy, 71
- of service, by refusing to enter service, 63
 - receive into service, 108
- immediate right of action, 109
- servant's duty to seek other employment, 114n

BRIBE

- to servant or agent, effect on contract, 65—66, 175n

BURGLARY

- by servant, in master's house, 304—5

CAB PROPRIETOR,

- liability for driver's negligence, 211

CARRIER,

- action by servant of, against consignor of dangerous article, 274n
- as bailee, 329
- liability for loss or injury, 211—3, 221n, 274n

CARRYING ON TRADE OR BUSINESS,

- what amounts to, in restrictive covenant, 55—7

CERTIFICATE,

remuneration depending on, 122

CHARACTER OF SERVANT. And see *Defamation*.

defamatory statement in, liability for, 283

effect of writing a statement on, 303

no action for refusal to give, 282

false, liability for giving, 282—3

CHASTISEMENT

of servant or apprentice, 72

CHECKWEIGHING, 123

CLERK,

notice due to, 40—41

CLERK OF PEACE,

agreement to surrender fees, 21

CLERK OR SERVANT,

who is, within meaning of embezzlement provisions of Larceny Act, 324—329

for preferential payment of wages, 127—8

CLIENTS,

meaning of term, in restrictive covenant, 58

COACHMAN,

authority to pledge master's credit, 194—5

COAL MINE,

breach of statutory rule, 198

COAL MINER,

wages due on dismissal, 135

COHABITATION,

agreement for, not a contract of service, 35, 117

as consideration in contract of service, 20

presumption of agency during, 4n

COLLABORATEURS,

who are, 151—3

COMBINATION,

when actionable, 169n, 170

COMMERCIAL TRAVELLER

distinguished from commission agent, 328—9

notice due to, 40

servant within Larceny Act, 328

whether employer bound to find employment for, 44n

COMMISSION,

- claim for, in winding-up, 128—9
- not recoverable by dishonest agent, 66
- to managing owner of ship, 65n
- secret, to servant, 65—6, 78
- when servant to be enabled to earn, 43—4

COMMISSION AGENT,

- scope of duties, 118

COMMON EMPLOYMENT,

- defence of, 143—156, 165
- no defence in action for breach of statutory duty, 164
- doctrine abolished in Employers' Liability Act, 1880...165

COMMON WORK,

- what is, for purpose of common employment, 151—3

COMPANY,

- contract of service with, when should be under seal, 9—14
- director, remuneration of, 117
- one man, servant of, 12n
- winding-up, effect on contract of service, 126
 - revokes authority to contract, 255n

COMPETENCY

- of servant, master's responsibility for, 146, 156

COMPOSITION WITH CREDITORS,

- no defence in action for wrongful dismissal, 113n

CONCILIATION

- in trade disputes, 125

CONFIDENTIAL INFORMATION

- not to be used by servant to master's prejudice, 68

CONSIDERATION

- in agreement in restraint of trade, 49
- in written contract of service, 18
- illegal, in contract of service, 20—1
- for extra remuneration, 118
- severability, when partly good and partly bad, 21

CONSPIRACY, 86, 168—170

CONTRACT,

- "as agents," 257n
- agent signing, liability on, 256—8
- of agent, ratification of, 176—7
- of corporation, when *ultra vires*, 14
 - when may be sued upon, though not under seal, 13
- depending on continued existence of person or thing, 136—7
- entire, wages due under, 132—3, 137

CONTRACT—*continued.*

- induced by bribe, 66
- of infant, when beneficial, 6, 7
- parol, what is, 16n
- for personal services, liability on, 135—6
- by servant, master's liability on, 174, 177—8, 254
 - master's admission of liability on, 177
 - in master's name, liability on, 254
 - in own name, liability on, 188, 254—5
 - after discharge, liability on, 197

CONTRACT OF APPRENTICESHIP. See *Apprenticeship Contract.*

CONTRACT OF SERVICE,

- bankruptcy of master, effect on, 125
 - servant, effect on, 1
- breach of, by leaving before due time, 64
 - by refusing to enter service, 63
 - receive into service, 108
 - inducing, 86—7, 171—2
- company as party, when seal necessary, 9—14
- consideration in, 18—21
 - illegal, 20—21
- corporation as party, when seal necessary, 8—14
 - liability of, 8
- death of master, effect on, 130
 - servant, effect on, 132, 135
- duration, 34—37
 - for lifetime, 60
- duties of servant to master under, 63
 - after leaving service, 68
 - during service, 64
- implied terms, 42—44, 46
 - confidential information not to be used, 68
 - good faith, 65, 78
 - none, to pay wages, 116n
- infant, as party, 5—7
- interpretation, 25
- lunatic as party, 7
- married woman as party, 2
- negative covenants enforced by injunction, 60—62
- non-assignability of, 1
- not to be performed within a year, 16—17
- parol evidence, admissibility of, 25
- part performance doctrine inapplicable, 17
- parties, 1
- partners, liability on, 8
- partnership dissolution, effect of, 129
- presumed, when, 35
- relationship created by, 29
- renunciation of, effect, 109
- requisites of, 16
- restrictive covenants in, 51

CONTRACT OF SERVICE—*continued*.

- specific performance not generally granted, 60—1
- stamp duty, when exempt from, 23—5
- winding-up of company, effect on, 126
- writing, when necessary, 16

CONTRACTOR,

- negligence of, when employer liable for, 239—244
 - of servants of, 237—244
- or servant, whether relationship is, 237—8

CONTRIBUTION

- among wrongdoers, 141

CONTRIBUTORY NEGLIGENCE

- in infant, 231—2
 - servant, 161, 163
- defendant who could have avoided injury not excused by, 229—231
- no defence in criminal proceedings, 273

CONVERSION,

- action for, against servant, 275—8

CO-PARTNERSHIP,

- stealing or embezzling property of, 325

COPYRIGHT,

- servant's ownership in, 94—8

CORPORATION,

- apprenticeship contract with, 14
- contract of service with, 8
- fraudulent use of property of, 272
- goods supplied, liability for, 12
- seal, when not necessary for valid contract with, 11—13
- ultra vires* contract of, 14
- work and labour, liability for, 12
- wrongful acts of servants of, liability for, 213—4, 252—3.

CORRUPT TRANSACTION

- by agent or servant, 66

COUNTY COURT,

- action for wages in, 124
 - by infant, 7
- injunction in, 59—60
- for seduction in, 105

CREDIT OF MASTER,

- servant's authority to pledge, 178—180, 182, 193—5, 196
 - revocation of, 196, 197

CRIME,

- concurrency in, for purpose of detection, 198n
- of servant, whether master answerable, 197—8

CRIMINAL CONDUCT

- as justification for servant's discharge, 76, 78—9

CRIMINAL LIABILITY

- of master, for servant's act done without authority, 202
 - when avoided by conviction of servant, 206—7
 - indemnity by servant, 207
- of servant, for acts done by orders of master, 266

CROWN SERVANTS,

- contracts by, 259
- torts of, 251—2, 279—81
- hold office during pleasure, 37

CUSTOM,

- evidence of, in construing contract of service, 27—29, 34—36
 - restrictive covenant, 50
- as to notice, 28, 38, 40
- termination of domestic service, 38

CUSTOMERS OR CLIENTS

- of employer, canvassing of, by late servant, 68
 - covenant not to solicit, 57—8
- property of, loss by servant's negligence, 210

DAMAGES

- for loss of service, 100
 - seduction, 101, 105
 - wrongful dismissal, 113—5

DAUGHTER

- as servant of parents, 4n

DEATH

- of apprentice, effect on apprenticeship contract, 136
 - master, duty of servant as to property of, 131n
 - effect on contract of service, 130
 - liability of estate for wages, 131
 - as revocation of authority to pledge credit, 255
 - partner, effect on contract of service, 129
 - servant, effect on contract of service, 135
 - no action in respect of, open to master, 99
 - wrongdoer, in action for enticing away servant, 90

DEDUCTION

- from wages, prohibition of, 122, 127

DEFAMATION,

- privilege, malice as answer to plea of, 299—302
 - reciprocity of interest in connection with, 296
- privileged communication, what is, 286—299
 - occasion, what is, 286—299
- publication, 285—6
- servant's character as vehicle of, 283
- special damage, when necessary to prove, 284

DISCHARGE OF SERVANT,

- causes justifying, 73
- tenancy of house by servant, effect of, 32—33
- third party bringing about, action for, 169—170
- wages payable on, 132—135
- wrongful, remedies for, 112

DISCHARGED SERVANT,

- contracts by, master's liability on, 197
- disclosure of information by, 197
- forcible removal of, 33n, 74

DISOBEDIENCE

- as justification for servant's discharge, 74, 142n
- to master's orders, act so done not necessarily outside scope of employment, 218
- when excusable in servant, 142, 164

DISTANCE

- in restrictive covenant, how measured, 53—54

DISTRESS FOR RENT,

- liability for irregularity in, 211, 233n

DOCK WARRANTS,

- dealing with, by servant, 186, 193

DOG,

- injury to servant by, master's action for, 98, 143n
- servant's knowledge of ferocity evidence against master, 209n

DOMESTIC SERVANT,

- absence without leave, discharge for, 74—75
- definition, 38—40
- larceny of master's property given to another, 313
- libel on, 286
- termination of service, 38
- wages due, 38, 131
 - preferential payment of, on master's death, 131

DRIVER

- of hackney carriage, liability for damage, 69, 210n
 - deemed servant of proprietor, 34n, 211
 - recovery of wages by, 124n.
- of hired conveyance, who responsible for negligence of, 235—6

ESTOPPEL

from denying servant's authority, 178, 180

EVIDENCE,

contract of service, interpretation of, 25—29, 328_n
knowledge of servant is that of master, 209_n
restrictive covenant, as to reasonableness of, 50
seduction action, 104—5

EXTORTION,

money obtained by, recovery of, 262—3
by sheriff's officer, attachment for, 269

FACTORY ACTS,

development of, 166

FALSE IMPRISONMENT,

action against master for, 223—5

FALSE PRETENCES,

distinguished from larceny, 313, 315—7

FALSIFICATION OF ACCOUNTS, 340**FARM BAILIFF,**

notice due to, 39

FELLOW-SERVANT,

action against, for negligence, 164—5
foreman as, 153—4
injury by negligence of, 143—156
who is, 149—155

FELONY,

injury by, prosecution should precede civil action, 99—100

FENCING MACHINERY,

liability for failure in, 162

FERRY,

liability for servant's invasion of, 214—5

FIDELITY GUARANTEES, 105**FIRE**

caused by negligence, liability for loss by, 210, 237_n, 243

FOOD,

master's duty to supply servant with, 138

FORBEARANCE TO SUE

as illegal consideration, 340

FORGERY, 272**FRAUD**

- as element in embezzlement, 333—7
- of servant, liability for, 67, 215, 278—9
- as justification for servant's discharge, 76

FRAUDS, STATUTE OF,

- and contracts of service, 16—22

FRIENDLY SOCIETY,

- larceny or embezzlement of property of, 325, 339

GAMEKEEPER,

- whether can be guilty of embezzlement, 330

GAME LAWS,

- master's liability for servant's illegal act under, 206, 267

GAOL GOVERNOR,

- responsibility for detention of acquitted prisoner, 209n

GENERAL HIRING, 34

- termination of, 37

GIFT

- may be remuneration, 125n

GOVERNESS,

- notice due to, 39—40

GRATUITY,

- when recoverable by servant, 125

GUARANTEE

- for fidelity, effect of guarantor's death, 106—7

GUN.

- loaded, negligence in leaving, 226

HARBOURING SERVANT,

- action for, 90

HIGHWAY,

- employer's liability for wrongful act on, by contractor, 241—2
- servant, 205, 210, 239, 241—2

HIRED CONVEYANCE,

- responsibility for driver's negligence, 235—7, 245—6

HIRED SERVANT,

who responsible for acts of, 233—4, 247—8

HOLDING OUT

of servant as agent, 180—181, 190

HOSPITAL,

liability for negligence of staff, 234

HUNTSMAN,

notice due to, 39

HUSBAND,

joint liability with wife for latter's torts, 5
liability for wife's contracts, 3—4

IDENTIFICATION,

doctrine of, in respect of negligence, 231

ILLNESS

of servant, effect on contract of service, 64, 83—4
as justification for discharge, 82

ILL-TREATMENT OF SERVANT,

penalty, 138—9

IMMORALITY

as justification for servant's discharge, 77—78

INCOMPETENCE

as justification for servant's discharge, 82

INDEMNITY

of servant, implied, 141
servant's action for, against master, 141—2
of master by servant for offences, 207

INDICTMENT

in larceny or embezzlement, 337—8

INFANT,

apprenticeship contract, when bound by, 5—7
common employment, applicability of doctrine to, 154
contracts of, 5—7
contributory negligence, whether capable of, 231—2
County Court action for wages by, 7
enticing away servant who is, action for, 89
injury to, parent's action for, 98—9
necessaries of, what are, 5
restrictive covenant in contract of service of, 51, 60
when enforceable against, 7

INFORMATION FOR PENALTIES,
master's liability to, 201

INJUNCTION

enforcing negative covenants in contract of service, 60—62
restraining dismissal of servant, not granted, 110—111
breach by servant of restrictive covenant, 59
use by servant of confidential information, 68—9

INNKEEPER,

liability for loss of guest's property, 244—5
negligence of ostler, 210
servant's refusal to receive guest, 206

INTEREST

on wages left in master's hands, 132

“INTERESTED IN” BUSINESS,

meaning of term in restrictive covenant, 56

INVENTION

by servant, ownership of, 92—94

JOINT AUTHORSHIP,

meaning, 98

JOURNALIST,

whether translation within contract of service, 97

JUS TERTII,

setting up by agent against principal, 260
servant against master, 70—71

LARCENY,

attempted, 319
by bailee, 317, 319
by clerk or servant, 309—320
distinguished from embezzlement, 308, 313, 320—3, 332—3
false pretences, 196n, 313, 315—7
in dwelling-house, 306
by finding, 314
of goods in process of manufacture, 307
inciting servant to commit, 309n
by master through servant, 199
by public officials, 320
by servant of goods in his custody, 309—317
in shop, warehouse, or factory, 305
from society or club by member, 310n
by workman of goods on which working, 317

LEGACIES

to servants, 342

LETTERS

of discharged servant, master's right to open, 73n

LIBEL,

criminal liability of publisher and proprietor, 199—200
right of convicted proprietor over against editor, 69
who liable for, 211, 277n

LICENSING LAWS,

master's liability for servants' offences against, 202—3

LIVERY,

property in, 125

LOAN

of servant, application of common employment doctrine, 150—
151
which employer responsible for acts of, 233—4,
247—8

LOCAL AUTHORITY,

larceny or embezzlement of property of, 326—7

LOSS OF SERVICE,

action for, 85—86, 98
damages in action for, 100
of daughter, what amounts to, 102—4
proof of, 98
in action for seduction, 101—2

LUGGAGE,

action for injury to, 99n
of servant, carrier's liability for loss, 274n

LUNATIC,

contract of service by, 7
servant becoming, 64n

MACHINERY,

master's responsibility for safety, 156—160

MAINTENANCE

of servant's litigation by master, 85n, 274

MALICE,

corporation, whether capable of, 213—4
as factor in action for inducing breach of contract, 87—88
meaning, 168, 169, 171, 299
as answer to plea of privilege in defamation, 299—302

MALICIOUS DAMAGE TO GOODS IN PROCESS OF MANUFACTURE, 307

MARRIED WOMAN,

- contracts of, 2
 - husband's liability on, 3—4
- hiring servants as husband's agent, 4
- torts of, husband's liability, 5
- wages and earnings of, as separate estate, 2
- warranty of authority by, 5

MASTER,

- determination who is, 232—7, 238, 247—8

MAXIMS,

- Actio personalis moritur cum persona*, 274n
- Delegatus non potest delegare*, 192, 193
- Imperitia culpæ adnumeratur*, 83
- In pari delicto potior est conditio defendentis*, 262
- Qui facit per alium facit per se*, 174, 206n, 249
- Quicquid acquiritur servo acquiritur domino*, 91
- Respondeat superior*, 208, 209, 264, 274
- Verba fortius accipiuntur contra proferentem*, 175
- Volenti non fit injuria*, 161, 164

MEDICAL ATTENDANCE

- for apprentice or servant, master's duty as to, 138—140
 - liability for, 139—140
- servant's authority to call in, 187—8

MEDICAL EXAMINATION

- of servant alleged pregnant, 72n

MEMORANDUM,

- contents of, to satisfy Statute of Frauds, 17

MENIAL SERVANT,

- definition, 38—40
- how service terminated, 38

MENS REA,

- when need not be shown, 202, 205

MISAPPROPRIATION

- by servant, not for own benefit, 314

MISCONDUCT

- of apprentice, master's remedy, 85
- as justification for servant's discharge, 76, 79, 80, 82
- of servant, action against in respect of, 82

MISFEASANCE,

- servant's liability for, 67, 273, 275

MISTAKE,

- money paid by, to servant or agent, 261—5

MONEY HAD AND RECEIVED,

- action against agent for, 265
- servant, 70, 71, 262—3
- for earnings paid him by third party, 92

MONTHLY WAGES,

- amount due on discharge, 134

MUNICIPAL CORPORATION,

- when seal necessary in contracts by, 9—10

NAVAL OFFICER,

- resignation of commission, 38n

NECESSARIES

- of infant, what are, 5

NEGLIGENCE,

- casual, what is, 237n
- collateral, liability for, 237—241
- causing injury to servant, master's action for, 98
- criminal liability of servant for, 269—270
- of employer, personal, liability for, 155—161
 - fellow-servant, 164—5
 - servant, master's liability, 67, 69, 78, 210, 217—223
 - as effective cause of injury though stranger the immediate cause, 225—7
 - third party, 172—3
- through leaving horse unattended, 226, 246
- Workmen's Compensation Act, 1905, and, 166

NEGLIGENCE IN BUSINESS

- as justification for servant's discharge, 77, 80, 81

NEGOTIABLE INSTRUMENT,

- agent's personal liability on, 256, 277
- forgery of, 272
- larceny of, by servant, 311
- servant's authority to deal with, 181, 182, 185, 192, 195, 197, 277
- whether person signing liable, 258

NONFEASANCE,

- servant's liability for, 274—5

NOTICE,

- custom as to, 28, 38
- reasonable, what is, 40—41
- terminating employment, period of, 37—41
 - weekly hiring, 36n

NOTICE TO QUIT

- given by servant in master's name, 177
- servant not entitled to, 32—33

NUISANCE,

- joint liability of master and servant for, 271
- by servant, master's liability, 205—6, 229, 239

NURSE,

- liability for negligence of, 234

“ON ACCOUNT OF,”

- significance of words, 257

“ON ACCOUNT OF” MASTER,

- when property so received, 329—333

OVERSEER,

- whether responsible for acts of assistant overseer, 209n

PARENTS,

- action by, for injury to child, 98—9
 - for seduction of daughter, 100
- children may be in service of, 4n, 6
- no implied contract with daughter for wages, 117
- right to daughter's services, 102

PART PERFORMANCE,

- doctrine inapplicable to contract of service, 17

PARTICULARS OF WORK AND WAGES, 122—3

PARTNER,

- authority as to hire and discharge of servants, 8
- claiming to be, as justification for discharge of servant, 79
- contract of service with, liability on, 8
- death of, effect on contract of service, 129
- as fellow-servant, 155
- restrictive covenant, suing for breach of, 57
- or servant, whether relationship is, 29
- sued by servant, 123

PARTNERSHIP,

- effect of dissolution on contract of service, 129—130

PATENT,

- servant's ownership of, 92—94

PAUPER

- living with other persons out of charity, no contract of service,
35

PAWNBROKER,

- liability for acts of servant, 204—5

PAYMENT

- to agent, how far a discharge, 181
- to servant, when deemed payment to master, 258—266

PENALTY

- for breach of statutory duty, 162
- or liquidated damages, how distinguished, 58—59
- securing restrictive covenant, 58

“PER PROCURATION,”

- significance of term, 256

PERSONAL INJURY

- to servant, master's action for, 98
- master's liability for, 142

PERSONAL SERVICES,

- liability on contract for, 135—6

PERSONAL UNDERTAKING,

- when binding on signatory, 257

PIECEWORK,

- particulars of work and wages, 122—3
- weekly payments for, do not prove weekly hiring, 36

PILOT,

- liability for fault of, 246—7

POST OFFICE,

- liability of servants of, for loss, 280

PREFERENTIAL PAYMENT OF WAGES

- on bankruptcy or winding-up, 126—127
- death of employer, 131

PREMIUM

- apprenticeship, when returnable on master's death, 131

PRICE

- quoted by servant, how far master bound, 179

PRIVILEGED COMMUNICATION

- defined, 286—7

PRIVILEGED OCCASION

- defined, 286—7

PRIZE MONEY, 92n**PROTECTION OF MASTER'S PROPERTY,**

- servant's duty as to, 67

PUBLIC-HOUSES,

payment of wages in, prohibited, 122

QUANTUM MERUIT,

suing master on, 112, 116, 121—131

RAILWAY COMPANY,

arrest by servant of, 223—4, 225n
authority of servants of, scope, 187—8, 190n
damage to, by engines brought on lines of, 272
master's action for injury to servant by, 99n
misconduct of servants of, punishment for, 271
negligence in leaving trucks on line, 226—7
obstruction of highway by, 206
overcrowded carriage, responsibility for, 227
publication of servant's dismissal privileged, 296

RATIFICATION

of act of servant, 251n
agent's contract, 176—7

“READY AND WILLING,”

meaning, 113

REASONABLENESS,

meaning, as applied to restrictive covenants, 51—2

RECEIPT

signed by servant, effect, 260—1
for wages, absence of, 124

RECEIVING STOLEN GOODS,

master and servant both guilty of, 198—9

REMUNERATION. See also *Wages*.

additional, when claimable, 118—119
depending on certificate of third person, 122
gift may be, 125
left to employer to determine, 119—122
for professional services, 120n, 121n
for services after dissolution of contract, 119
other than wages, 125

RESTAURANT,

liability for loss of customer's property, 245

RESTRAINT OF TRADE. See *Restrictive Covenant*.**RESTRICTIVE COVENANT,**

assignee, when passing to, 57
breach restrained by injunction, 59—60
“carrying on business,” meaning, 55—57

RESTRICTIVE COVENANT—*continued.*

- consideration, 49
- construction of, 50—51, 54—55
- in contract of service, 48
- development of employee's abilities not to be restricted, 57
- distance in, how measured, 53
- infant, when enforceable against, 7
- "interested in" business, meaning, 56
- partner may sue on, 57
- penalty or liquidated damages securing, 58
- protection from business rivalry by, 50
- reasonableness as test, 49—55
- severability of, 51
- soliciting customers or clients prohibited by, 57—8
- unlimited as to space, 53
 - as to time, 52—53

RETAINER,

- when should be made under seal, 9—11

REVOCATION

- of authority to contract, 255

RISK,

- servant's acceptance of, 161

ROBBERY,

- servant not liable to master if victim of, 67

SAFETY,

- master's duty as to ensuring, 157—161, 172—3

SCHOOLMASTER,

- notice due to, 41

SCOPE OF AUTHORITY

- of agent, to bind principal on contracts, 175
- of servant, to bind master on contracts, 177—184
 - usual employment as test, 188

SCOPE OF EMPLOYMENT,

- whether servant's act within, 217, 223—229

SEAL,

- when necessary in corporation's contract, 8—14

SEAMAN,

- certificate of discharge, right to, 282n
- correction of, by master, 72n
- justification for leaving ship, 133
- persuading to desert, an offence, 86n

SEAMAN—*continued.*

- wages, claim for extra, 118—119
 - cannot be sued for in absence of contract, 117
 - under entire contract, 133, 137
 - monthly, amount recoverable at termination of service, 134
- unseaworthy ship, shipowner's liability for, 148
- wrongful dismissal of, action for, 116

SECRET PAYMENT

- to servant or agent, 65—66

SECRET PROCESS,

- use of, by servant, to prejudice of late employer, 69

SECRETARY OF COMPANY,

- authority of, 195n

SECURITY

- for discharge of duties, forfeiture of, 119n

SEDUCTION,

- action for, cross-examination, 104
- damages, 101, 105
- evidence, 101, 104—5
- remitted to County Court, 105
- who may bring, 101—102

SERVANT,

- who is, within meaning of testamentary provisions, 342—7

SETTLEMENT,

- how gained, 2n, 33

SHERIFF,

- liability for bailiff's wrongful act, 197—8, 209, 280

SHIP,

- arrest of, for work done, 124n
- detention of, when foreign owners liable for personal injury, 166
- employment in, 167
- persons employed on, who responsible as employers, 232, 234n, 235—7, 239
- seaworthiness, owner's liability as to, 148

SHIPMASTER,

- no presumption of yearly hiring, 34n

SIGNATURE

- by agent, 174n
- procuration, 192
- to written contract of service, 21—22

SKILL,

- implied warranty as to, 82

SLANDER

of servant, when special damage not necessary, 284—5

SMOKE NUISANCE,

liability of employer, 204, 205n

SOLDIER,

when not claimable by late master, 135

SOLICITOR,

responsibility for clerk's wrongful act, 209n, 216

SPECIFIC PERFORMANCE

of contract of service, not generally granted, 60—61, 111

SPECULATION

as justification of servant's discharge, 78

STAMP DUTY,

exemptions, 23—25

unstamped document in criminal proceedings, 25, 337

STATUTES,

Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 2...309n

Agricultural Gangs Act, 1867 (30 & 31 Vict. c. 130)...167

Alkali, &c., Works Regulation Act, 1906 (6 Edw. VII. c. 14),
s. 20...207

Appointment Act, 1834 (4 & 5 Will. IV. c. 22)...131

Apprentices (Settlement) Act, 1757 (31 Geo. II. c. 11)...2n

Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4...115

Army Act, 1881 (44 and 45 Vict. c. 58), s. 96...72, 135
s. 144...135

Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44...14

Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 33...126
s. 34...125n
s. 51...14

Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25...192

Bread Act, 1836 (6 & 7 Will. IV. c. 37)...207

Carriers Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 68)...212

Checkweighing in Various Industries Act, 1919 (9 & 10 Geo. V.
c. 51)...123

Children Act, 1908 (8 Edw. VII. c. 67), s. 12...138n
s. 131...23n

Children Act (1908) Amendment Act, 1910 (10 Edw. VII. and
1 Geo. V. c. 25)...23n

Children (Employment Abroad) Act, 1913 (3 & 4 Geo. V. c. 7)
...23n

Chimney Sweepers and Chimneys Regulation Act, 1840 (3 & 4
Vict. c. 85), s. 3...23

Chimney Sweepers Regulation Act, 1864 (27 & 28 Vict. c. 37)
...23n

Coal Mines Act, 1911 (1 & 2 Geo. V. c. 50), s. 96...122

STATUTES—*continued.*

- Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69),
 s. 76...14
 s. 206...128
 s. 209...127
- Conciliation Act, 1896 (59 & 60 Vict. c. 30)...125
- Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86)...86
 s. 6...138n
- Copyright Act, 1911 (1 & 2 Geo. V. c. 46), s. 5...94, 97
 s. 16...98
- Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102)
 ...200
- Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47
 Vict. c. 51)...200
- County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 35...209
 s. 96...7
 1903 (3 Edw. VII. c. 42)...7
 1919 (9 & 10 Geo. V. c. 73), s. 11...124
- County Police Act, 1839 (2 & 3 Vict. c. 93)...327
- Criminal Justice Administration Act, 1914 (4 & 5 Geo. V.
 c. 58), s. 14...308
- Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 9...319
- Currency and Bank Notes Act, 1914 (4 & 5 Geo. V. c. 14),
 s. 1...306n
- Embezzlement by Collectors Act, 1810 (50 Geo. III. c. 59),
 s. 2...323n
- Employers' Liability Act, 1880 (43 & 44 Vict. c. 42)...141, 143,
 161, 162, 165
- Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90)...72, 124
 s. 6...131
 s. 10...39
- Employment of Children Act, 1903 (3 Edw. VII. c. 45)...23n
- Employment of Women, Young Persons and Children Act, 1920
 (10 & 11 Geo. V. c. 65)...23n, 168
- Factors Act, 1889 (52 & 53 Vict. c. 45)...186n
- Factory and Workshop Act, 1901 (1 Edw. VII. c. 22)...167
 s. 10...162
 ss. 10—18...157n
 s. 116...123
 1907 (7 Edw. VII. c. 39)...167
- Factory and Workshop (Cotton Cloth Factories) Act, 1911
 (1 & 2 Geo. V. c. 21)...167
- Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24)...340
- Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93)...142, 165
- Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68)...94n
- Fire Prevention (Metropolis) Act, 1774 (14 Geo. III. c. 78),
 s. 86...210n
- Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 6...320n
 1913 (3 & 4 Geo. V. c. 27)...340n
 ss. 2, 6...272
- Frauds, Statute of (29 Car. II. c. 3), s. 4...16
- Frauds, Statute of, Amendment Act, 1828 (9 Geo. IV. c. 14),
 s. 6...174

STATUTES—*continued.*

- Frauds by Workmen Act, 1748 (22 Geo. II. c. 27)...338
 1777 (17 Geo. III. c. 56)...338—9
- Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 87...339n
- Game Act, 1831 (1 & 2 Will. IV. c. 32)...206
- Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 5...269
- Highways Act, 1835 (5 & 6 Will. IV. c. 50), s. 70...205
- Hosiery Act, 1843 (6 & 7 Vict. c. 40)...339
 1845 (8 & 9 Vict. c. 77)...122
- Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48)
 ...122
- Indictments Act, 1915 (5 & 6 Geo. V. c. 90)...338
- Industrial Courts Act, 1919 (9 & 10 Geo. V. c. 69)...125
- Inland Revenue Act, 1867 (30 & 31 Vict. c. 90), s. 17...268
- Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41)...206n, 245
- Labourers, Statute of, 1349 (23 Edw. III.)...86n, 87
- Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 68...325, 329
 1916 (6 & 7 Geo. V. c. 50), s. 1...317
 s. 9...307
 s. 11...315n
 s. 13...306
 s. 17...320, 321, 323
 s. 18...320
 s. 19...320
 s. 20...272
 s. 26...305
 s. 27...305n
 s. 33...337
 s. 39...338
 s. 40...325, 337
 s. 44...309n, 313n, 338
 s. 46...306n
 s. 47...317
- Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7...200, 207n
- Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3...203, 268
 s. 16...202.
- Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V.
 c. 24), s. 65...203n
 s. 68...203
 s. 75...202
 s. 79...203
- Limitation Act, 1623 (21 Ja. I. c. 16)...132
- Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5...327
- London Building Act, 1894 (57 & 58 Vict. ch. ccxiii)...273
- London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86)...34,
 69, 210n, 211, 303
 s. 22...124
 s. 28...207
- Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116...344
- Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 14...307
- Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 5...207n
- Married Women's Property Act, 1882 (45 & 46 Vict. c. 75),
 s. 1...2, 3
 s. 2...2

STATUTES—*continued.*

- Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)—
continued. s. 5...2
 1893 (56 & 57 Vict. c. 63)...3
- Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28)...203
- Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 108...23
 ss. 128, 129...282n
 s. 155...137n
 s. 236...86n
 s. 395...23
 s. 458...148n
 s. 633...246
- 1906 (6 Edw. VII. c. 48), ss. 34, 35...139n
 ss. 37—39...137n
- Merchant Shipping (Stevedores and Trimmers) Act, 1911 (1 & 2 Geo. V. c. 41)...124n
- Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77),
 s. 9...122
- Misappropriation by Servants Act, 1863 (26 & 27 Vict. c. 103)
 ..314
- Motor Car Act, 1903 (3 Edw. VII. c. 36)...204n
- Mutiny Act, 1859 (22 Vict. c. 4), s. 63...135
- National Health Insurance Acts, 1911 to 1921...141
- Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28)...173
- Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100)...210n
 s. 8...319n
 s. 26...138
 s. 35...272
- Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 1, 2...29
 s. 5...8
 s. 18...106
- Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93)...204
- Payment of Wages in Public Houses Prohibition Act, 1883
 (46 & 47 Vict. c. 31)...122
- Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 23...269
- Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 1...308
- Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15...268
- Pilotage Act, 1913 (2 & 3 Geo. V. c. 31), s. 15...246
- Poisons and Pharmacy Act, 1908 (8 Edw. VII. c. 55), s. 2...268
- Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), s. 64...2n
 1844 (7 & 8 Vict. c. 101), s. 12...23
 1849 (12 & 13 Vict. c. 103), s. 15...326
- Poor Law (Apprentices, &c.) Act, 1851 (14 & 15 Vict. c. 11)...
 23n, 138
- Poor Relief Act, 1601 (43 Eliz. c. 2), s. 4...23
 1691 (3 Wm. and Mary c. 11)...2n
 1819 (59 Geo. III. c. 12), s. 7...327
- Post Office Act, 1908 (8 Edw. VII. c. 48)...320n
- Prevention of Corruption Act, 1906 (6 Edw. VII. c. 34)...66
 1916 (6 & 7 Geo. V. c. 64)...66
- Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61)...
 252n
- Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174...10

STATUTES—*continued*.

- Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 23, 24...204n
- Public Stores Act, 1875 (38 & 39 Vict. c. 25), s. 9...320n
- Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7 ...212
- Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 124, 125...272
- Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), ss. 13, 14...272n
1842 (5 & 6 Vict. c. 55)...271
- Representation of the People Act, 1918 (7 & 8 Geo. V. c. 64), s. 34...200
- Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63)...204
s. 6...268
- Servants' Character Act, 1792 (32 Geo. III. c. 56)...283
- Shipowners' Negligence (Remedies) Act, 1905 (5 Edw. VII. c. 10)...166
- Shops Act, 1912 (2 Geo. V. c. 3)...167
1913 (2 & 3 Geo. V. c. 24)...167
- Silk Weavers Act, 1845 (8 & 9 Vict. c. 128)...122
- Slaughter Houses (Metropolis) Act, 1874 (37 & 38 Vict. c. 67) ...203
- Smoke Nuisance (Metropolis) Act, 1853 (16 & 17 Vict. c. 128) ...204
- Special Constables Act, 1838 (1 & 2 Vict. c. 80)...208
- Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 25...23
- Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49)...320, 323
- Sunday Observance Act, 1677 (29 Car. II. c. 7)... 21, 272
- Territorial and Reserve Forces Act, 1907 (7 Edw. VII. c. 9), s. 10 (1) ...72
- Thames Watermen Act, 1827 (7 & 8 Geo. IV. ch. lxxv)...269
- Trade Disputes Act, 1906 (6 Edw. VII. c. 47)...86, 172
- Tramways Act, 1870 (33 & 34 Vict. c. 78)...241
- Treason Act, 1351 (25 Edw. III. St. 5. c. 2)...319n
- Truck Act, 1831 (1 & 2 Will. IV. c. 37)...122, 127, 204
1887 (50 & 51 Vict. c. 46)...122
1896 (59 & 60 Vict. c. 44)...122
- Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 4...313n
- Weights and Measures Act, 1878 (41 & 42 Vict. c. 49)...204n
- Westminster 2 (Statute of) (13 Edw. I. c. 11)...208
- Women and Young Persons (Employment in Lead Processes) Act, 1920 (10 & 11 Geo. V. c. 62)...168
- Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58)...141, 143, 165, 208n

STATUTORY DUTY,

action for breach of, 162—164

STEVEDORE,

as independent contractor, 237

SUNDAY,

contract made on, 21

exercise of business or calling on, 272—3

M.S.

SURETY

for servant, 105—7

SURGEON,

fees to, when recoverable by master of injured servant, 100
remuneration in absence of agreement, 121n

TAXIMETER,

falsification of accounts by means of, 341

TELEGRAM,

error in, liability for consequences, 191, 217

TENANCY

by servant for master, 33

TENANT

or servant, whether relationship is, 32
servant as, position on dismissal, 32—33

TENDER

to servant, 181n

THEATRICAL PROFESSION,

custom in, 29

THIRD PERSON,

servant hired for, who liable for wages, 130n
servant's liability to, for money received on account of, 265—6
negligence of, liability for, 172—3
action of, against master for servant's negligence, 69
master's action against, for depriving him of servant, 85

THREATS

to servants or workmen, when unlawful, 169

TIPS

as item in damages for wrongful dismissal, 114

TORT

by servant in carrying out master's orders, 273—4
of servant, liability to third parties, 273, 279
liability of master, 208, 215—6

TRADE DISPUTE,

act in pursuance of, when not actionable, 172
conciliation and enquiry in, 125

“TRADE OR BUSINESS,”

how term construed in restrictive covenant, 54—5

- TRADE UNION,**
 action against, 168—172
- TRAMWAY COMPANY,**
 liability for injury to passengers, 228
- TRANSLATION,**
 whether within journalist's contract of service, 97
- TRAVELLING EXPENSES,**
 whether reimbursement claimable, 114, 118
- TRESPASS,**
 action for, against servant, after conviction, 339—340
 when not maintainable by servant, 33
 by servant of corporation, 214
 on order of master, 141—2
 liability for, 248—250
- TROVER,**
 action for against servant, 275—8
- TRUSTEE,**
 liability of for property lost by servant's felony, 244
- UNIVERSITY,**
 whether examiner the servant of, 97—8
- URBAN AUTHORITY,**
 whether contract with should be under seal, 10
- VALUABLE SECURITY**
 defined, 306n
- VENUE**
 in larceny or embezzlement, 338
- VICE-PRINCIPAL,**
 whether fellow-servant, 153—4
- VOLUNTEER,**
 application of doctrine of common employment to, 149
- WAGES,**
 absence, whether forfeited by, 132
 agreement to pay necessary, 116—122
 implied, 116—7

WAGES—*continued*.

- broken period of service, 37, 130, 132, 133
- coalminer, 135
- death of master, who liable for amount due at, 131
 - servant, amount due, 137
- domestic servant, 38, 131
- embezzlement may prevent recovery of, 76
- entire contract, amount due under, 132—3, 137
- in lieu of notice, 111
- infant's action in County Court for, 7
- married woman's, separate estate, 2
- payment in current coin and without deductions, 122, 127
 - in public-houses forbidden, 122
- no work given, whether payable, 45
- pieceworkers, particulars to be given, 122—3
- preferential payment in bankruptcy, 126—7
- presumption of payment, 124—5
- receipt for, effect of absence of, 124
- recovery of, action for, against whom, 123
 - remedies, 116
 - summary proceedings, 124
- suspension, whether claimable during, 64

WAIVER

- of servant's misconduct, 74

WAREHOUSEMAN,

- conversion by, 278

WARRANTY

- by servant, how far binding, 182—5, 191

WARRANTY OF AUTHORITY,

- breach of, 258—9

WEEKLY HIRING,

- evidence of, 36
- termination of, 36n

WIFE,

- authority to pledge husband's credit, 197n
- injury to, by fellow-servant's negligence, 145n

WILL,

- direction in, as to employment of particular person, 348—50
- provision for servants in, 342

WINDING-UP OF COMPANY,

- effect on contracts of service, 126

WORK AND LABOUR,

- action by master for, 91
- corporation's liability for, 12

WORK FOR SERVANT,

master's obligation to find, 42

WORKMEN'S COMPENSATION,

receipt of, does not determine contract of service, 84

WRONGFUL DISMISSAL,

action for, 110, 112

damages, 113—5

once only on same agreement, 115

passes to trustee in bankruptcy, 113

readiness to continue to serve must be shown, 113

YEARLY HIRING, 34

custom as to, 36

presumption of, 35—7

termination of, 37

wages for broken period in, 37, 130, 133

with weekly or monthly wages, 37

YEAR'S WAGES,

legacy of, 344—5

